THE PRESENT PRACTICE OF THE COURT OF King's Bench;

CONTAINING

AMPLE AND COMPLETE INSTRUCTIONS

FOR COMMENCING AND DEFENDING

The various Kinds of Suits and Actions, entering up Judgment, suing out Execution, proceeding in Error from the KING's BENCH, COMMON PLEAS, EXCHEQUER CHAMBER, and PARLIAMENT, &c.

AND CALCULATED NOT ONLY

TO GUIDE THE ATTORNEY,

IN THE COURSE OF HIS PRACTICE,

In Cases already settled; but also, by pointing out the Rise and Ground of the various Proceedings, and the several Cases in each already adjudged, to enable him by Analogy to conduct any new Matters that may occur.

CONTAINING

RULES OF COURT DOWN TO MICHAELMAS TERM, 1784,

And enriched with a Number of very curious and special Precedents of the various Writs, Pleadings, Entries, &c. in Use in the Court of KING's BENCH; and particularly of DECLARATIONS, a great Number of which are very special, and settled by the most eminent Pleaders.

To which is added a complete INDEX.

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With the Assistance of other Gentlemen of the LAW.

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THE PRESENT PRACTICE OF THE COURT OF KING'S BENCH.

Chapter I.

INTRODUCTION.

Origin and Jurisdiction of the Court of King's Bench.

THIS court is the supreme court of Common Law.

It is a branch of the ancient *aula regia*, or *aula regis*, a court instituted by the Conqueror, and so called from sitting constantly in his own hall. This court always followed the king; but in the reign of king John, the court of common pleas was separated from the *aula regia*; and the 11th article of Magna Charta enacts, that *Communia placita non sequantur curiam regis sed tenantur in aliquo loco certo*, which certain place then was, and hath ever since been, Westminster-hall, the place where the *aula regia* originally sat.

It is a branch of the *aula regia*.

It is called the King's Bench, because the king used to sit here in person; and the stile of the court still is *coram ipso rege*; but he cannot determine any cause or motion, but by the mouths of his judges, to whom he has committed his whole judicial authority.

Why called the king's bench.

It hath for some centuries past sat at Westminster, but might remove with the king if he should so command.

Where sitting.

It is the *custos morum* of the realm, and may punish any offence contrary to the first principles of justice.

Jurisdiction.

It keeps all inferior jurisdictions within the bounds of their authority, and either prohibits, or removes their proceedings into this court.

It

It compels magiſtrates and others to perform the duty of their offices.

It protects the liberty of the ſubject in a ſummary manner.

To the court of king's bench was allotted the criminal juriſdiction ſolely; but now on the plea-ſide, or civil branch it hath an original juriſdiction and cognizance of all actions of treſpaſs, and other injuries alledged to have been committed *vi et armis*, or with force; of all actions for forgery of deeds, maintenance, conſpiracy, deceit, and actions upon the caſe, which alledge any fraud, all which are of a criminal nature: for although brought for a civil remedy, the defendant is in ſtrictneſs liable to pay a fine to the king, as well as damages to the party. The ſame doctrine is now extended to all actions upon the caſe whatſoever; and it doth, by what is called fiction of law; hold pleas of all perſonal actions: this fiction is, that the defendant is arreſted for a ſuppoſed treſpaſs which has never in reality been committed, and thus being in cuſtody of the marſhal of this court, the plaintiff is at liberty to proceed againſt him for any perſonal action whatſoever.

Other courts uſe like fiction.

As this court, inſtituted for criminal matters, takes cognizance of a variety of other buſineſs, by the fiction of the ſuppoſed treſpaſs, ſo doth the court of common pleas, originally inſtituted for the trial of real actions, make uſe of the fiction of the defendant having broke into the cloſe of the plaintiff, whereby the title to the land might come in queſtion; and the exchequer of that of the plaintiff being a debtor to the crown, which debt it is ſuggeſted he is the leſs able to pay, by reaſon of the defendant witholding that for which he ſues, to extend their juriſdiction.

Do not hold pleas under 40s.

This court cannot, as being beneath its dignity, hold plea in any perſonal action, where the debt or damage is leſs than forty ſhillings. It is enacted, 43 *Eliz. c.* 6. "That if any perſonal action be brought in any of her majeſty's courts at Weſtminſter (not being for any title or intereſt of lands, not concerning the freehold or inheritance of any lands, nor for any battery) and it ſhall appear to the judges of the ſame court, and ſhall be ſo ſignified by the juſtices before whom the ſame ſhall be tried, that the debt or damages

damages therein to be recovered, ſhall not amount to the ſum of 40*s.* in every ſuch caſe, the judges or juſtices before whom ſuch action ſhall be purſued, ſhall not award to the plaintiff any more coſts than the ſum of the debt or damages ſo to be recovered ſhall amount to; but leſs at their diſcretion.

This court, like all the other courts of this country, is bound to judge according to the known and fixed laws of the land, that is to ſay, the common law, the *lex non ſcripta*, or the cuſtoms of the realm, and the written or ſtatute law; nor can the one or the other be altered, but by expreſs ſtatute: the rules of practice, or mode of proceeding in each court, are indeed, of courſe, much under the regulation of the reſpective courts, yet any material alterations in this reſpect, or ſuch as may, in any very conſiderable degree, affect the ſubject, are generally, and indeed it is to be wiſhed ever may be, made by act of parliament. Bound by law.

The judges of the court are at preſent four * in number, the chief juſtice, and three *puiſne* judges, who are, by their office, ſovereign conſervators of the peace, and ſupreme coroners of the land: their commiſſions were, in early periods, *durante bene placito*, afterwards *quamdiu ſi bene geſſerint*, but removable on the addreſs of both houſes of parliament; and the demiſe of the crown was held to vacate their commiſſion; but it doth not now ſo do by 1 *Geo.* 3. *c.* 23. This act was made at the earneſt recommendation of the king himſelf from the throne, declaring, "that he looked upon the independance and uprightneſs of the judges as eſſential to the impartial adminiſtration of juſtice, as one of the beſt ſecurities of the rights and Of the judges of this court.

* During the greater part of the reign of James the firſt, the king's bench and common pleas had each five judges, for the benefit of a caſting vote, and it ſeems to have been a wiſe regulation; for if the court are equally divided in opinion on any point, no judgment can be given; or perhaps the preſent eſtabliſhment may be as proper, as no judgment is judgment for the defendant.

liberties of his ſubjects, and as moſt conducive to the honour of his crown." *Com. Journ.* 3 *March*, 1783.

Obſervations on 1 G. 3. c. 23.] Notwithſtanding the many encomiums which have been paſſed upon the framers of this ſtatute, with reſpect to their zeal for the rights and liberties of the ſubject, it hath, in our humble opinion, whether deſignedly or not, we will not take upon ourſelves to ſay, a direct oppoſite tendency to that which it holds forth, and ſecures the dependance, rather than the independance of the judges on the reigning ſovereign. Acts of this nature, virtually admit what the hiſtory of this country has, at many periods, proved to have been the caſe; that it is poſſible for the perſons who preſide in the ſeveral courts of law, to act corruptly, illegally, and unjuſtly, and for the king to wiſh them ſo to do. What then is the operation of this act; the reigning prince means to convert the venerable expounders of the law into inſtruments of tyranny and oppreſſion. Mindful of their oath, mindful of the rights of the fellow ſubject, they refuſe the infamous taſk: how is the influence of the crown abridged by this ſtatute. The king could not before diſplace them, nor can now: it is exultingly ſaid his ſucceſſor. And is the power of a prince abridged by taking away an appeal to, or power from his ſucceſſor; reaſon and hiſtory both tell us to the contrary. A point of law was once in diſpute between the reigning prince, and the heir to the crown, (George the ſecond, and Frederick, prince of Wales, the father of his preſent majeſty,) which was referred to the judges: we will not preſume to ſay that this matter was had in remembrance when the act was brought forward, but ſurely the heir to the crown at leaſt, had more chance of equal juſtice before the paſſing of that act, than he now has: and if we advert, that every power of reward and advancement is, as before, in the poſſeſſion of the crown, we cannot heſitate to determine, that the judge who may be advanced by the king on the throne, and who cannot be diſplaced by his ſucceſſor, is more likely to be dependant upon that king, than he was before the ſucceſſor had loſt the power of diſplacing him.

The

The officers on the plea or civil side of this court, of which we mean at present to treat, are, the chief clerk, his secondary, the clerk of the rules, clerk of the papers, docquets, commitments and satisfactions, clerk of the declarations, filazer, clerk of the common bails, signer of the writs, clerk of the treasury, and *custos brevium*, clerk of the errors, sealer of the writs, marshal, clerk of the papers of the king's bench prison, associate and marshal, clerk of *nisi prius*, usher, cryer, deputy court keeper, and keeper of Westminster-hall. Of the officers on the civil or plea side.

All writs and process which are to be signed, are issued in the name of the chief clerk.

This office is executed by deputy, who doth all the business of the court, and hath the custody of all writs, records and judgments.

It is a singular happiness to the present times, that the administration of the law in these our days, is in general so pure, upright, uncorrupt and able; and, if the rigid observer of the ancient common law rules has sometimes been alarmed at occasional deviations from the strictness of those rules, it must, at least, be acknowledged, that the relaxation in every such instance has invariably been in favor of *substantial justice*. On the present administration of justice in this court.

Chap. II.

Of the Terms.

THIS court sits for the dispatch of business at four particular periods of the year, which are denominated *terms*: these terms were originally no other than the leisure seasons which were not occupied by the great feasts or festivals, or not liable to the general avocations of rural business; thus *Advent* and Of the Terms.

Chriſtmas formed the winter vacation, *Lent* and *Eaſter* that in the ſpring; the time of *Pentecoſt* the next, and the long vacation between *Midſummer* and *Michaelmas* was allotted for harveſt, ſo that the terms naturally fell into a four-fold diviſion; and from ſome feſtival day which immediately preceded their commencement, were denominated the terms of *St. Hilary*, of *Eaſter*, of *St. Michael*, and of the *Holy Trinity*, which terms have been regulated and abbreviated by ſeveral acts of parliament, particularly *Trinity Term*, by 32 *Hen.* 8. *c.* 21. and *Michaelmas Term*, by 16 *Car.* 1. *c.* 6. and 24 *Geo.* 2. *c.* 48.

Of the returns.

There are, in each of theſe terms, ſtated days of appearance, which are generally at the diſtance of a week from each other, and are regulated by ſome feſtival of the church: on ſome one of theſe days all original writs muſt be made returnable; and therefore they are generally called the returns of that term; whereof every term has more or leſs, ſaid by the Mirror, *ſec.* 5. 108. to have been originally fixed by king Alfred, but certainly ſettled as early as the ſtat. of 51 *Hen.* 3. *ſt.* 2. But though many of the return days are fixed upon Sundays, yet the court never ſits to receive theſe returns till the Monday after; and therefore no proceedings can be had, or judgment, or ſuppoſed to be, given on the Sunday. 51 *H.* 3. *ſt.* 3. 32 *H.* 8. *c.* 21. 1 *Inſt.* 135. *Salk.* 627. 6 *Mod.* 250. 1 *Ven.* 156. 2 *Lill. Abr.* 569.

The firſt return in every term is, properly ſpeaking, the firſt day in that term; as for inſtance, the octave of *Saint Hilary*, or the eighth day incluſive after the feaſt of that ſaint, which falling on the thirteenth of January, the octave therefore, or the firſt day of *Hilary* term is the twentieth of January; and thereon the court ſits to take eſſoigns, or excuſes, for ſuch as do not appear according to the ſummons of the writ; wherefore this is uſually called the eſſoign day of the term. But the perſon ſummoned has three days of grace, beyond the return of the writ, in which to make

make his appearance; and if he appears on the fourth day inclusive, it is sufficient. 2 *Lill. Abr.* 569. 1 *Inst.* 135.

Michaelmas Term hath four Returns.

1. On the morrow of *All Souls.*
2. On the morrow of Saint *Martin.*
3. On the octave of Saint *Martin.*
4. From the day of Saint *Martin in* 15 *days.*

Returns by Bill.

On ( ) next after the morrow of *All Souls.*
On ( ) next after the morrow of St. *Martin.*
On ( ) next after the octave of St. *Martin.*
On ( ) next after 15 days from the day of St. *Martin.*

Hilary Term hath four Returns.

1. On the octave of Saint *Hilary.*
2. From the day of Saint *Hilary* in 15 days.
3. On the morrow of the purification of the bleſſed virgin *Mary.*
4. On the octave of the purification of the bleſſed virgin *Mary.*

Returns by Bill.

On ( ) next after the octave of St. *Hilary.*
On ( ) next after 15 days from the day of Saint *Hilary.*
On ( ) next after the morrow of the purification of the bleſſed virgin *Mary.*
On ( ) next after the octave of the purification the bleſſed virgin *Mary.*

Eaſter

Eaſter Term hath five Returns.

1. From the day of *Eaſter* in 15 days.
2. From the day of *Eaſter* in three weeks.
3. From the day of *Eaſter* in one month.
4. From the day of *Eaſter* in five weeks.
5. On the morrow of the aſcenſion of our Lord.

Returns by Bill.

On ( ) next after 15 days from the day of *Eaſter*.

On ( ) next after three weeks from the day of *Eaſter*.

On ( ) next after one month from the day of *Eaſter*.

On ( ) next after five weeks from the day of *Eaſter*.

On ( ) next after the morrow of the aſcenſion of our Lord.

Trinity Term hath four Returns.

1. On the morrow of the holy *Trinity*.
2. On the octave of the holy *Trinity*.
3. From the day of the holy *Trinity* in fifteen days.
4. From the day of the holy *Trinity* in three weeks.

Returns by Bill.

On ( ) next after the morrow of the holy *Trinity*.

On ( ) next after the octave of the holy *Trinity*.

On ( ) next after fifteen days from the day of the holy *Trinity*.

On ( ) next after three weeks from the day of the holy *Trinity*.

HILARY Term, begins January 23, (except it happens on Sunday) then on the Monday following, and ends February the 12th if not Sunday, then on the Monday following.

Eaſter

Easter Term, begins Wedneſday fortnight after *Easter* day, and ends on Monday before Whitſunday.

Trinity Term, begins on the Friday after *Trinity Sunday*, that day being appointed by the 32 *H.* 8. *c.* 21. and ends the Wedneſday fortnight after, unleſs it happens to be on the 24th of June, the feaſt of St. *John* the baptiſt, which is no court day, then it muſt be adjourned to the next day. *Cro. Jac. p.* 16. 2. *Bulſtrode* 242.

Michaelmas Term, begins November the 6th, (except it happens on a Sunday) then on the Monday next after, and ends November the 28th, if not Sunday, then the 29th. 24 *Geo.* 2. *c.* 48.

The iſſuable terms are, *Hilary* and *Trinity*.

There are no ſittings in *Weſtminſter-hall* on *Aſcenſiond-ay*, *Midſummer-day*, and the ſecond day of February, being the purification.

The Exchequer, opens eight days before any term (except *Trinity*) before which, it opens but four days.

The firſt and laſt days of every term are the days of appearance.

Chap. III.

Of Attornies of this Court.

ATTORNIES are perſons appointed by the court to proſecute or defend actions for their clients; formerly every ſuitor was obliged to appear in perſon; but *Stat. Weſtm.* 2. *c.* 10. gave all perſons liberty of appearing by attorney; in conſequence of which, many improper perſons were admitted by the judges; on which it was enacted, 4 *Hen.* 4. *c.* 18. That the judges ſhould examine them, and at their diſcretion put thoſe who were virtuous and of good fame on the roll, and ſtrike out the reſt; and 33 *Hen.* 6. *c.* 7. limited the numbers in Norfolk and Suffolk. Of attornies as originally conſtituted.

But at preſent perſons intending to become attornies muſt ſerve a regular clerkſhip; for no perſon can be Attornies muſt ſerve a regular clerkſhip.

be admitted an attorney, unleſs he has ſerved a clerkſhip of five years to an attorney duly admitted, takes the appointed oaths, and be inrolled, after an examination with reſpect to his abilities, by a judge of the court. 2 *G.* 2. *c.* 23.

Perſons articled to attornies, muſt cauſe affidavit to be made within three months after the execution of the articles; the names and places of abode of the parties muſt be inſerted in ſuch affidavit, with the day of the date of contract, the ſame filed with the proper officer in the court where his maſter is admitted, in a book to be kept for this purpoſe. 22 *G.* 2. *c.* 46.

Every clerk muſt, during the full term of five years, be actually employed by ſuch attorney, or his agent or agents, in the proper buſineſs and practice of an attorney. 22 *G.* 2. *c.* 46.

Clerk having ſerved five years to a ſolicitor in chancery, may be admitted an attorney without fee or ſtamp. 23 *G.* 2.

Clerk having ſerved a prothonatory, or ſecondary of either court, five years, may be admitted an attorney.

If the attorney dies, or leaves off buſineſs, the clerk may be diſcharged by rule or order of court, and be aſſigned to another inrolled attorney for the remainder of the time. An affidavit muſt be made, executed, and filed, of ſuch ſecond contract, by one of the ſubſcribing witneſſes. 22 *G.* 2,

No perſon can be admitted without affidavit of having actually and really ſerved, and having been employed by the attorney or attornies to whom bound, or his or their agent, during the whole term of five years. This affidavit muſt be read in the court where the party is to be admitted. 22 *G.* 2.

Quakers having ſerved a clerkſhip agreeable to the ſtatue, may be inrolled upon affirmation. 12 *G.* 2.

The conſideration-money given with the clerk muſt be inſerted in the articles, in words at length, under penalty of double the money given.

Admiſſion.

An affidavit is made by the clerk of his faithful ſervice. The article executed by the attorney, ſigned

ſigned by him, muſt be produced to a judge, whom the ſecondary's clerk muſt alſo attend with the original affidavit of the due execution of the articles. The judge, after examination, gives his *fiat*, for the admiſſion, which is ingroſſed, by the ſecondary's clerk. On taking the appointed oaths in court, the court ſigns the admiſſion, and the attorney's name is entered upon the roll.

Affidavit of the Execution of Articles of Clerkſhip.

A. B. &c. maketh oath, that he this deponent did ſee *C. D.* one of the attornies of his majeſty's court of king's bench, *E. F.* of, *&c.* and *G. H.* the clerk to the ſaid *C. D.* ſeverally ſign, ſeal, and as their ſeveral acts and deeds, in due form of law, deliver certain articles of agreement, bearing date the —— day of ——, and made between the ſaid *E. F.* and *G. H.* of the one part, and the ſaid *C. D.* of the other part, whereby the ſaid *E. F.* and *G. H.* agreed, that the ſaid *G. H.* ſhould ſerve the ſaid *C. D.* as his clerk, in the practice of an attorney and ſolicitor, for the term of five years, to be computed from the day of the date of the ſaid articles. And this deponent further ſaith, That the ſaid names *E. F. G. H.* and *C. D.* ſet and ſubſcribed oppoſite to the ſeveral ſeals affixed to the ſaid articles, as the parties executing the ſame, are of the ſeveral and reſpective proper hand writings of the ſaid *E. F. G. H.* and *C. D.* and that the name *I. K.* thereto ſet as one of the ſubſcribing witneſſes to the ſaid articles is the proper hand writing of *I. K.* and that the name *L. M.* thereunto ſet as the other ſubſcribing witneſs, is the proper hand writing of this deponent

Sworn, *&c.* *L. M.*

Affidavit of due Servitude.

In the king's bench.

G. H. of *&c.* maketh oath and ſaith, that he this deponent hath duly ſerved *C. D.* in the annexed articles mentioned, as his clerk, for the ſpace or term of five years, in purſuance of the ſaid annexed articles.

It was formerly the cuſtom for the maſter to give a certificate of the clerk's due ſervitude, but this is not now required.

Attornies are to take the oaths to the government under penalties and diſability to practice. 13 *W.* 3. *c.* 6.

Attornies convicted of forgery, perjury, *&c.* practiſing, the judge hath power to tranſport for ſeven years, as felons. 12 *G.* 2. *c* 29.

No attorney ſhall have more than two clerks at one time, and every attorney ſhall be inrolled before he is allowed to ſue out writs in the courts at *Weſtminſter*, under the penalty of twenty pounds. 2 *G.* 2. *c.* 23.

No attornies or ſolicitors ſhall commence any action for fees, until a month after the delivery of their bills, ſubſcribed with their hands: and ſuch bills may be taxed, and upon the taxation, the ſum remaining due is to be paid in full of the ſaid bills; or in default, the parties ſhall be liable to attachment: the attorney is to pay the coſts of taxation, if the bill be reduced a fixth part. 2 *G.* 2. *c.* 23.

An attorney or ſolicitor, having fees due to him, may detain writings until his juſt fees are paid. 1 *Lill.* 148.

Cannot detain writings, which are delivered upon ſpecial truſt, for the money due to him in that very buſineſs, &c. *Mod. Caſ. L. and Eq.* 306.

Attorney undertaking to appear to a writ, upon ſummons before a judge, ſhall be compelled to do it. 6 *Mod* 86. *Str.* 693. 12 *Mod.* 251.

No perſon ſhall change his attorney without rule of court, or order of a judge, and notice to the adverſe party, or his attorney; and the new attorney coming in, is to take notice, at his peril, of the rules whereunto the former attorney was liable, had he continued. *Mich.* 1654.

The bill muſt be firſt paid. 12 *Mod.* 440.

Attornies may be puniſhed in a ſummary way, either by attachment, or having their names ſtruck out of the roll, for ill-practice attended with fraud and corruption, and committed againſt the rules of juſtice,

juſtice, and common honeſty. 12 *Mod.* 251, 318, 440, 583, 657.

An attorney was ordered to pay coſts (as well as his client), having joined in an affidavit to ſupport a frivolous complaint, and having made reſentful declarations, which ſhewed him to be perſonally active in it. 2 *Burr.* 654.

An action lies againſt an attorney for neglecting to charge a perſon in execution at his client's ſuit, according to a rule of court; although it ſeems rather want of judgment than negligence. 3 *Wilſ.* 325. but the court will not proceed againſt him in a ſummary way. 4 *Burr.* 2060.

An attorney permitting any perſon to practiſe in his name, not being a ſworn attorney, ſhall be diſabled from practiſing. 22 *Geo.* 2. *c.* 46. *ſec.* 11. and the court may commit the unqualified perſon to priſon for any time not exceeding one month; and the attorney to forfeit fifty pounds. *Ibid. ſect.* 12, 14.

No clerk of the peace, or deputy, nor any under-ſheriff, or deputy, ſhall act as ſolicitor, attorney, or agent, at any general or quarter ſeſſions of the peace, where he ſhall execute ſuch office, under the penalty of fifty pounds, to be ſued for within ſix months next after the fact committed. *Ibid. ſec.* 33.

Attornies are to be governed by the maſter and to attend him on notice. *Hil.* 15 *Car.* 2.

May file bills and declarations, paying two ſhillings a term, and examine the files *gratis*. Mich. Car. 2. reg. 3.

An attorney is not bound to diſcover and give in evidence the contents of a deed ſhewn him by his client, nor any inſtructions given him by his client; nor can he be forced to act againſt his will.

Attorney not enrolled, ſuing out any writ, forfeits 50 *l.* for each offence; clerks in the exchequer, chancery, pipe-office, &c. attornies of the mayors, ſheriffs, and dutchy courts, and officers of the courts at Weſtminſter excepted. 2 *Geo.* 2. Made perpetual, 30 *Geo.* 2.

Attornies diſmiſſed by one court for miſdemeanors, ſhall not, after certificate, be admitted to practiſe in another court. Rule, *Mich.* 1654.

An attorney by an authority in writing from an attorney of another court, may act in that court: 2 *Geo.* 2. Made perpetual, 30 *Geo.* 2.

Attornies may not be juſtices of the peace during ſuch time they continue on the roll. 5 *Geo.* 2.

An attorney, if a priſoner, cannot proſecute ſuits, unleſs ſuch ſuit was brought before his impriſonment, but is not diſabled from defending ſuits. 12 *Geo.* 2.

No perſon may act as attorney at ſeſſions, unleſs admitted according to 2 *Geo.* 2. under penalty of 50*l.* with treble coſts; and attorney permitting perſons not admitted to uſe his name in the courts of general or quarter ſeſſions, ſubject to the like penalty: Lancaſter, Durham, Cheſter, and dutchy of Lancaſter, or courts of great ſeſſions in Wales excepted. 22 *Geo.* 2.

No attorney may be leſſee in ejectment. Rule, *Mich.* 1654.

No attorney of this or any other court, may be bail in this court. *Mich.* 14 *G.* 2.

Attorney delaying his clients ſuit, or demanding more than his dues, ſhall pay coſts, and treble damages, and be ſtruck off the roll. 3 *Ja.* 1.

Chap. IV.

Of Actions.

AS all wrong may in ſome ſort be conſidered as a privation of right, the natural remedy is being put in poſſeſſion of that right; this may be effected either by a ſpecific reſtoration of the matter in diſpute, or when that is not a poſſible or an adequate remedy, by a pecuniary ſatisfaction in damages; to extend this idea to matters of aſſault, &c. we may obſerve that the party acquires a right to ſuch damages the moment the injury is received; although that right be not fully aſcertained until they are aſſeſſed by the intervention of the law, the inſtrument to obtain this remedy, is an action called in the Mirrour, the "[a] *lawful demand of one's right*," and by Bracton and Fleta in the words of Juſtinian "*jus proſequandi in judicio quod alicui debetur.*"

[a] c. 2. *ſ.* 1, 6 Inſt. 4, 6.

Actions are *criminal*, or *civil*.

Criminal actions lie for ſome penalty on the party ſued, and are called penal actions.

Popular actions, lie for a breach of ſome penal ſtatute; and are called popular actions, becauſe not given one ſpecially; but generally to any that will proſecute as well for himſelf, as the king, and are generally called *qui tam* actions, becauſe brought by a perſon "*qui tam pro domino rege, &c. quam pro ſe ipſe in hac parte ſequitur.*"

Civil actions, are real, perſonal, and mixed. Real, which concern real property only, are ſuch whereby the plaintiff, or demandant, claims title to any lands or tenements, rents, commons, or other hereditaments, in fee ſimple, fee tail, or for term of life: but theſe actions have for ſome time been moſtly laid aſide, being very dilatory and expenſive; and a more commodious method is contrived to diſpute the title of lands, called an ejectment; of late, however, real actions ſeem to have been coming into uſe again, for reaſons which will be ſeen when we treat of the ſtatutes of limitation.

Perſonal

Perſonal actions, are *account*, *aſſumpſit*, *covenant*, *debt*, *aſſault* and *battery*, *falſe impriſonment*, *caſe*, *treſpaſs*, and *replevin*.

Mixed actions, partake of the nature of the other two, as ſome real property is demanded, and alſo perſonal damages for a wrong ſuſtained; as ejectment intitles the plaintiff not only to reſtitution for the term of years, but alſo damages for the wrong: waſte not only to recover the land waſted, but alſo treble damages, by 6 *Ed.* 1 *c.* 5.

Account, lays againſt a bailiff or receiver, and may be brought againſt the executors and adminiſtrators of every guardian, bailiff, and receiver, and by one jointenant, or tenant in common, againſt the other as bailiff for receiving more than his ſhare. 4 *Ann. c.* 16. but theſe actions are now much diſuſed, the common method being to proceed by bill in equity.

Aſſumpſit, is founded upon a contract, either expreſſed or implied; and is an action on the caſe.

Expreſs Aſſumpſit, is for the breach of a promiſe, which is in the nature of a verbal contract; thus if a builder promiſe to build a houſe by a certain day, and fails, this action lies for the damages ſuſtained by the delay. In debt by ſimple contract, if the debtor promiſe to pay, and doth not, this action lieth on the breach of promiſe, inſtead of *debt*. A promiſſory note, not under ſeal, is an *expreſs aſſumpſit*; and the payee or indorſee may recover the value in damages. But by ſtat. 29 *Car.* 2. *c.* 3. where an executor or adminiſtrator promiſes to anſwer damages out of his own eſtate; where a man undertakes to anſwer for the debt, default, or miſcarriages of another; where any agreement is made upon conſideration of marriage; where any contract or ſale is made of lands, tenements, or hereditaments or any intereſt therein: or where any agreement is not to be performed within a year from the making ſuch agreement, unleſs ſome note or memorandum be made in writing, and ſigned by the party, to be charged therewith, with a mere verbal *aſſumpſit* is void.

Implied Aſſumpſit, is where goods are ſold, or work is done, without any price agreed upon; here the law implies

implies a promiſe and ſatisfaction to the value. When one has received money belonging to another, for, money paid by miſtake, or on a conſideration which happens to fail, or through impoſition, extortion, or oppreſſion, or where undue advantage is taken of the plaintiff's ſituation. 4 *Burr.* 2012. For money laid out for the uſe of another, the law implying a promiſe of repayment, and upon an account ſtated. *Carth.* 446.

Covenant, ariſes where there is an agreement under ſeal, perſons aggrieved by breach of ſuch agreement, may have this action, and recover damages for the breach of this action, beſides coſts.

Debt, is now ſeldom brought but upon ſpecial contracts, under ſeal, and matters of record; for if brought upon ſimple contract, the plaintiff labours under two difficulties: Firſt, the defendant has the advantage of waging his law if he thinks proper; (that is if he will ſwear that he doth not owe the money, and eleven of the neighbours ſwear that they believe his oath to be true, he ſhall be diſcharged of the demand) and ſecondly, the plaintiff muſt recover the whole debt he claims, or nothing at all. For the debt is one ſingle cauſe of action; and, if the proof varies from the claim, it cannot be looked upon as the ſame contract. *Dyer* 219. It lies on a judgment given in an inferior court, though under 40*s.* becauſe it is warranted by *ſtat. Cro. Eliz.* 96. *Roll. Abrid.* 600. 1 *Wilſon* 316. 23 *H.* 8. *c.* 15.

Aſſault, lies where there is an attempt or offer to beat another without touching him; as if one lifts up his cane or his fiſt in a threatning manner at another; or ſtrikes at him, but miſſes him. *Finch* 202. Battery is the unlawful beating of another. The leaſt touching of another perſon wilfully, or in anger, is a battery; 6 *Mod.* 173, 149. *Vent* 256. but battery is in ſome inſtances lawful, as due correction given by a parent or maſter to a child, ſcholar, or apprentice, or in defence of a man's perſon or goods.

Aſſault and *falſe impriſonment*. This action lies for every confinement of the perſon without ſufficient authority, and is commonly joined to an aſſault and battery;

battery; for every impriſonment includes a battery, and every battery an aſſault. 2 *Inſt.* 489.

Caſe, or Treſpaſs on the Caſe. This action lies for malicious, ſcandalous, and ſlanderous words, tending to any perſon's damage and derogation [a]. For affecting a man's health, by ſelling him bad proviſions or wines [b], by the exerciſe of a noiſome trade which infects the air in his neighbourhood; or by the neglect or unſkilful management of a phyſician, ſurgeon, or apothecary [c]. Againſt carriers and others upon the cuſtom of England [d]; againſt inn-keepers for a gueſt's goods ſtolen in his houſe [e]. For deceits in contracts, bargains, and ſales [f]; for negligence; or keeping a dog accuſtomed to bite ſheep [g]; taking or enticing away a ſervant or apprentice [h]; diſturbance in the uſe of a ſeat in the church [i]; for injuries done in commons [k]; for malicious proſecutions, conſpiracy, eſcape, and reſcous [l]; breaking down a party wall; ſtopping of antient lights, and for any private nuſance to a man's walls, light, or air [m]; againſt ſheriffs for default in executing writs [n]; for diſturbing a parſon in taking his tithes, &c. 2 *Cr.* 478. it alſo lieth in a variety of other inſtances: as for calling a maiden a whore, or ſaying ſhe has had a baſtard, whereby ſhe loſes her marriage; for calling a married woman a whore; for damaging an horſe which has been hired, by immoderate riding; if a horſe is ſold as ſound and proves unſound; againſt a farrier who lames a horſe in ſhoeing him; for reſcuing diſtreſs when driving to the pound; for ſtopping of a water courſe from running through another's grounds; for ſtopping a way through which another hath a right to paſs; againſt a taylor who ſpoils cloaths that he is intruſted to make; againſt a man who erects any building, or doth any other act to hinder his neighbour's light. It is indeed impoſſible to enumerate all the occaſions on which this action will lie, it being an univerſal remedy given for all perſonal wrongs and injuries without force, the diſtinction being, that where the act is an immediate injury to the perſon or property, the remedy is by action of *treſpaſs vi et armis*, but where there is only a culpable

[a] Hob. 138.
[b] Roll. Abr. 95.
[c] 11 H. 6. 18.
[d] 10 Ann. 14.
[e] Moor 177.
[f] Danv. 173.
[g] 1 Vent. 190.
[h] 1 Cro. 177.
[i] Moor 907.
[k] Style 168.
[l] 1 Salk 15.
[m] 3 Inſt. 131. 9 Rep. 54
[n] 1 Cro. 277.

culpable omiſſion, or where the act is only by conſequence, and collaterally injurious, then it muſt be by this action. 11 *Mod.* 180. *Lord Raymond* 1402. *Str.* 635.

Trover is a ſpecial action on the caſe, which one man hath againſt another, who hath in his poſſeſſion any of his goods by delivery, finding, or otherwiſe; and ſells or makes uſe of them without his conſent, or refuſes to deliver them on demand; and it is to recover damages to the value of the goods: and is ſo called from ſuggeſting that the plaintiff hath loſt the goods in queſtion, and the defendant hath found the ſame, and converted them to his own uſe. 2 *Lill. Abr.* 618.

Detinue lies for the recovery of goods in ſpecie, and alſo for damages for the detainer. But as the defendant in this action may wage his law, *trover* is the action in more common uſe.

Treſpaſs, or *Treſpaſs vi et Armis*, lies for injury done by one man to another, as entering on another's ground without a lawful authority, and doing ſome damage however inconſiderable to his real property; or for any immediate injury to the perſon or property of another as before obſerved.

Replevin is an action which a perſon whoſe goods or beaſts are wrongfully taken in diſtreſs, may have againſt the diſtrainer, upon giving ſecurity, by bond, to the ſheriff, that he will proſecute the action; and if it ſhould be determined againſt him, return the diſtreſs, which is on ſuch ſecurity, delivered up to the perſon bringing ſuch action. *Mirror.* c. 266. *Weſtm.* 2. 13 *Ed.* 1. c. 2. 11 *Geo.* 2. c. 19.

Actions of aſſumpſit and trover, are actions on the caſe; aſſault, and aſſault and falſe impriſonment, are actions of treſpaſs vi et armis.

Perſons who may bring actions.

All perſons may ſue but ſuch as are attainted of treaſon or felony, convicted of *præmunire*, out-lawed, or excommunicated, alien enemies, or under religious orders of the church of *Rome*, theſe cannot ſue, but may be ſued; executors or adminiſtrators, though out-lawed, may ſue in right of their teſtator or inteſtate; a woman under covert cannot ſue, or be ſued, without her huſband, except in *London*, as a ſole trader under

the cuſtom. Infants muſt ſue by *prochien ami*, and defend by guardian. Ideots cannot ſue, but muſt appear in perſon in defending ſuits brought againſt them. A lunatic cannot ſue, but may appear to a ſuit commenced againſt him (if a minor) by guardian; if of full age, by his attorney. 1 *Inſt.* 128, 135. 6 *Rep.* 3. 10 *Mod.* 6.

Executors, when plaintiffs, muſt all be named; but when an action is brought againſt them, it muſt be only againſt ſuch of them as adminiſter.

Alſo, joint tenants muſt ſue jointly; tenants in common ought to join in actions perſonal, but not real; and in aſſize and ſlander of title, they ought to ſever. Divers perſons may have an action of treſpaſs jointly for goods taken, or the like; but of battery, or ſuch perſonal treſpaſs, the action ought to be ſingle; if one treſpaſs be done by divers, the plaintiff may make it joint, or ſeveral, as he pleaſes; and yet two that join in a treſpaſs, do ſo make one treſpaſſer, that one of them is anſwerable for the other; and if they be ſued in one action, they may ſever in pleas and iſſues, and a releaſe to one is a releaſe to all. Alſo the jury muſt aſſeſs damages for all, but there ſhall be but one ſatisfaction; and where a joint action doth lie againſt ſeveral perſons, and ſome of their names are known, and ſome are not, the action may be brought againſt them that they are known by their particular names, and declare with a *ſimul cum aliis, &c.* 2 *Lill. Abr.* 469. *Comb.* 260.

Of the limitation of ſuits.

If perſons were permitted to bring their actions at any diſtance of time, innumerable perjuries would enſue. Memory of facts that may be neceſſary to be proved in the defence, may, by length of time, be worn out of the minds of the witneſſes, who could once have proved them; nor can perſons be ſuppoſed ever to retain, even the written documents, which may be neceſſary upon ſuch occaſions. It is therefore to be preſumed, that demands made after a certain are either ill-founded, or have been ſatisfied therefore.

"No perſon ſhall have a writ of right of the poſſeſſion of his anceſtor, but within ſixty years, nor of his own but within thirty years." 32 *Hen.* 8. c. 2.

This

This limitation doth not extend to any ſuit for advowſons. 1 *Mar. St.* 2. *c.* 5.

A claim or entry, to prevent the ſtatute, muſt be upon the land, unleſs there ſhall be ſome ſpecial reaſon to the contrary. *Salk.* 205. 2 *Str.* 1086.

"All writs of *formedon* ſhall be ſued within twenty years next after the title or cauſe of action firſt deſcended or fallen, but if the perſon entitled to ſuch writ be at the time of the ſaid right firſt deſcended or fallen, within twenty one years, *feme covert*, *non compos mentis*, impriſoned, or beyond the ſeas, then ſuch perſon and his heirs may bring his action, or make his entry as he might have done before this act; ſo as ſuch perſon or his heirs, ſhall within ten years next after full age, diſcoverture, &c. take benefit of, and ſue forth the ſame." 21 *Jac.* 1 *c.* 16.

"All actions, &c. brought for any forfeitures on any penal ſtatute made, whereby the forfeiture is limited to the queen, ſhall be brought within two years; and all actions upon any penal ſtatute, the benefit whereof is limited to the queen and to the proſecutor, ſhall be brought within one year; and in default of ſuch purſuit, then to be brought for the queen within two years after that year ended. And if any ſuit ſhall be brought after the time in that behalf before limited (except on the ſtatute of tillage), the ſame ſhall be void and of none effect." 31 *Eliz.* *c.* 5.

"Actions for words ſhall be commenced and ſued within two years next after the words ſpoken, &c." 21 *Jac.* 1 *c.* 16.

This does not extend to *ſcandalum magnatum*, nor to caſes where the ſpecial damage is the gift of the action; but where the words of themſelves are actionable, ſpecial damage will not take them out of the ſtatute. 1 *Sid.* 95. *Saunders* 61.

"All actions of treſpaſs, of aſſault, battery, wounding, impriſonment, or any of them, ſhall be commenced within four years next after the cauſe of ſuch actions or ſuits." 21 *Jac.* 1 *c.* 16.

All actions of treſpaſs *quare clauſum fregit*, actions of treſpaſs, detinue, trover, and replevin, for taking away of goods and chattels; actions of account (other than ſuch accounts as concern the trade of merchandize between merchant and merchant, their factors and

ſervants), actions on the caſe (except ſlander); actions of debt, grounded upon any lending or contract without ſpecialty, debt for arrearages of rent, are to be brought within ſix years next after the cauſe of action. 21 *c. Jac.* 1. *c.* 16.

Treſpaſs for beating a ſervant, *per quod ſervitium amiſit*, is not within the ſtatute, being founded on the the ſpecial damage. *Salk.* 206.

Nor are feme coverts, perſons that are *non compos*, impriſoned or beyond ſea, and infants: but here it is to be obſerved that perſons not bound by this act, muſt be in the ſituation therein deſcribed at the time of the action accruing; thus a perſon being beyond the ſeas at that time hath the benefit of the ſtatue; but if the cauſe of action ariſeth while in the kingdom, although the perſon go beyond the ſea immediately after, yet ſhall the time be computed from the day that the cauſe of action aroſe.

Debt on 2 *Ed.* 6. for tithes, on an award, for a fine of a copyholder, rent on an indenture of leaſe, or for an eſcape, are not within the *Stat.* 1 *Sid.* 305. 1 *Saund.* 33. D° 37. 1 *Lev.* 273.

Nor an action brought againſt a ſheriff for money levied on a *fieri facias*, becauſe the action is founded *in maleficio*, as alſo becauſe the judgment on which the *fieri facias* iſſued, is a matter of record. 1 *Mod.* 205. 212.

A charity is not barred by length of time, 2 *Vern.* 399.

A legacy is not within the ſtatute, 1 *Vern.* 256.

Nor a mortgage. 1 *Chan. Caſ.* 102.

Chap. V.

Of the Venue and the changing thereof.

Venue and the changing thereof.

THIS country being, for the more convenient adminiſtration of juſtice, divided into ſeveral ſeparate diſtricts, which are termed counties (a diviſion ſaid to have been made by, but which has certainly ſubſiſted from the time of Alfred) it is neceſſary that the demand ſhould be made, or to uſe the technical term, that the action ſhould be laid, or the injury declared to have been done in ſome one ſpecific county, which is called laying of the *venue* or *viſne*; that is, the *vicinia* or neighbourhood in the which as the injury is declared to have

have been done; ſo from that neighbourhood muſt come the jury for the trial of the cauſe. *F. N. B.* 115.

Literally the *venue*, in Norman French, means *coming*; and the writ of *venire*, being a command to the ſheriff to cauſe a jury to *come*, the laying the *venue* is merely the appointing *the coming* in this or that county.

Many niceties which were formerly to be obſerved with reſpect to laying of the *venue*, are now removed by the 4 and 5 *Ann. c.* 16. which enacts "That every "*venire facias* for the trial of any iſſue, ſhall be award-"ed of the body of the proper county where ſuch "iſſue is triable." Alſo ſee *ſtat.* 24 *G.* 2. *c.* 18. which extends to trials on penal ſtatutes.

All real and mixed (which are local) actions, as waſte, ejectment, treſpaſs for breaking the cloſe, cutting down trees, ſpoiling the corn, graſs, &c. and debt upon an eſcape, muſt be laid, or the injury declared to have happened where the cauſe of action aroſe, or where the lands lie; that is, where it really did happen, 2 *Lill. Abr.* 782. but perſonal and tranſitory actions, which might have happened any where, as debt, detinue, aſſault, &c. may be brought in any county.

But when againſt officers of places, &c. muſt be laid where the fact was committed, 21 *Jac.* 1. *c.* 12. *ſ.* 5. or the defendant will be found not guilty, *Co. Lit.* 282. 2 *Inſt.* 235. but a nuiſance muſt be laid in the proper county, *Mich.* 8. *Ann K. B.*

Informations and popular actions muſt be laid in the proper county, 21 *Jac.* 1. *c.* 4. or defendant ſhall be found not guilty: debt for rent againſt the aſſignee of a term on the privity of eſtate is local, and will lie no where but in the county where the lands are, *Cro. Car.* 133. *Jones* 43.

But although it is, in tranſitory actions, in the power of the plaintiff to declare in what county he pleaſes, and then the trial muſt be had in the county in which the declaration is laid, yet if the defendant will make affidavit that the cauſe of action, if any, aroſe not in that, but in another county, the court will direct a change of the *venue*, and oblige the plaintiff to declare in the other county, unleſs he will undertake to give material evidence in the firſt. Thus is the benefit of that moſt excellent proviſion in that bulwark of our rights and liberties, the trial by jury, viz. that the jury

ſhould

ſhould be called from thoſe parts, the inhabitants whereof are the moſt likely to be competent judges of the cauſe of diſpute, always preſerved to the ſubject, but in thoſe particular inſtances in which there would be manifeſt impropriety or injuſtice in ſo doing.

This power in the courts of changing the *venue* is founded on the *ſtat.* 6 *R.* 2. *c.* 2. which having ordered all writs to be laid in their proper counties; this, as the judges conceived, empowered them to change the *venue* if required, and not to inſiſt rigidly on abating the writ (as was the ancient cuſtom); which practice began in the reign of James I. 2 *Salk.* 670. and this power is diſcretionally exerciſed, ſo as not to cauſe, but prevent a defect of juſtice: therefore the court will not change the *venue* to any of the four northern counties, previous to the ſpring circuit; becauſe there the aſſizes are holden only once a year, at the time of the ſummer circuit, *Str.* 480. It will ſometimes remove the *venue* from the proper juriſdiction, (eſpecially of a narrow and limited kind) upon a ſuggeſtion, duly ſupported, that a fair, impartial, or at leaſt a ſatisfactory trial cannot be had therein. *Trin.* 4 *G.* 3. *B. R. Stra.* 874. 3 *Burr.* 1764. In the laſt caſe it appeared, "That the verdict was againſt the "weight of evidence, and a new trial granted, and the "motion was to change the *venue* from the city of "Cheſter, to the county at large, which was ordered."

The *venue* cannot be changed but to a county where the whole cauſe of action aroſe. 1 *Wilſ.* 178.

An attorney has no privilege to have the *venue* changed into Middleſex where he is defendant, tho' he has a privilege, when plaintiff, to lay it and keep it there; (unleſs he ſues it in *auter droit* as executor, &c. or jointly with another perſon, then the privilege is loſt,) 4 *Burr.* 2027. Barriſters and officers of the court have the like privilege. *Ibid.*

It cannot be changed from Middleſex into any Welch county. 4 *Burr.* 2450.

If an whole county be intereſted in the queſtion to be tried, the trial muſt by law be in ſome adjoining county. *Stra.* 177.

In local actions, the courts of law ſometimes change the *venue* indirectly, or by conſent of the parties; but although it ſhould be abſolutely neceſſary to a fair, impartial, and ſatisfactory trial, yet it cannot; they

they even then effect it directly and abſolutely; but it is in ſuch caſes upon application to a court of equity there done upon the foregoing ground; this among a number of other inſtances, was the caſe of the iſſues directed by the houſe of lords, in the cauſe between the duke of Devonſhire and the miners of the county of Derby, *A. D.* 1762.

Affidavit to change the Venue.

In the king's-bench, Between { *A. B.* plaintiff. / *C. D.* defendant.

C. D. of, &c. the defendant in this cauſe, maketh oath and ſaith, that the cauſe of action mentioned in the declaration in this cauſe, if any ſuch there be, did ariſe in the county of *S.* and not in the county of *E.* nor elſewhere out of the ſaid county of *S.*

The court will on the motion of the defendant's, counſel on this affidavit, of which motion it is not requiſite to give notice to the plaintiff's attorney, make a rule which is abſolute, to change the *venue* a copy of which muſt be ſerved on the plaintiff's attorney.

If the declaration be delivered eight days before the end of the term, defendant cannot move to change the *venue* the next term. *Stra.* 211.

Venue may be changed after an order for time to plead. 1 *Wilſ.* 245.

If the plaintiff moves to diſcharge the rule to change the *venue*, it muſt be before application.

If the rule is diſcharged upon the plaintiff undertaking to give material evidence in the county where the *venue* is laid, and he ſhould fail ſo to do, he will be nonſuited.

Though a plaintiff cannot regularly move to change the *venue*, yet he may in effect do it, by moving to amend. *Stra.* 1162.

The court ſuffered the plaintiff to amend the *venue* after the defendant had changed it upon the common affidavit, *Stra.*

Venue never ſuffered to be changed in debt. *Stra.* 878.

Chap. VI.

Of the Juſtices of Aſſize and Niſi Prius.

Of the Juſtice of Aſſize and Niſi Prius.

AS the court of king's bench doth now, and hath long ſat in Weſtminſter-hall, all actions brought in this court, ſhould of courſe be there tried, although by a jury ſummoned out of the county, in which the *venue* is laid; but this would, were it actually to be the practiſe, be very vexatious to the ſuitors, who would in ſuch caſe be brought up to Weſtminſter, from every part of the kingdom, and would be obliged to bring with them their witneſſes, to the ſame place, at a very great expence; would be of great hardſhip to the jurors in being brought ſo far from their own homes for the deciſion of cauſes, and increaſe the buſineſs of the courts at Weſtminſter to an inconvenient degree.

Of the Circuits.

But theſe evils are obviated by the courts of *aſſize* and *niſi prius*; which are compoſed of two or more commiſſioners, who are twice in every year ſent by the king's ſpecial commiſſion, all round the kingdom, (except London and Middleſex, where courts of *niſi prius* are held in, and after every term, and the four northern counties, Weſtmoreland, Cumberland, Northumberland, and Durham, where the aſſizes are holden only once a year) to try by a jury of the reſpective counties ſuch matters as are then under diſpute in tn the courts of Weſtminſter-hall.

The ſeveral counties are for this purpoſe divided into ſix diſtinct diſtricts, which are called circuits, viz.

The *Midland*, containing the counties of

Northampton, Rutland, Lincoln, } Derby, Leiceſter, Warwick.

The *Norfolk* Circuit.

Bucks, Bedford, Huntingdon, } Cambridgeſhire, Norfolk, Suffolk.

The

The *Home* Circuit.

Hertford, Eſſex, Kent,	Suſſex, Surry.

The *Oxford* Circuit.

Berks, Oxford, Hereford,	Glouceſter, Monmouth, Stafford & Worceſter.

The *Weſtern* Circuit.

Southampton, Wilts, Dorſet,	Cornwall, Devonſhire, Somerſet.

The *Northern* Circuit.

Yorkſhire, Durham Northumberland,	Cumberland, Weſtmoreland, Lancaſhire.

The officers belonging to the circuit are, the clerk of aſſize, the aſſociate, clerk of arraigns, clerk of indictments, judges marſhal, cryer, clerk, and tipſtaff.

The ſheriff of each county, and his deputy, are to attend the judges, and the coroner alſo attends to deliver in all inquiſitions, &c. to the clerk of aſſize in court, and he is to return all writs of *venire*, *diſtringas*, and *habeas corpora*, where the ſheriff is a party in the ſuit; which writs are ſpecially directed to him for that purpoſe.

Chap. VII.

Of the Proceſs of the Court.

THE moſt common and uſual proceſs of this court, is what is entitled *a bill of Middleſex*; which is ſo called, becauſe the court now ſits in the county of Middleſex; for if it ſat in any other

Of the proceſs of the court.

county, it would be a bill of that county: thus when the court ſat at Oxford, on account of the plague, *Mich.* 1665. the proceſs was by bill of Oxfordſhire. *Tryes, Jus. Filizar*, 101.

The bill of Middleſex was formerly always founded upon a plaint of treſpaſs, entered upon the records of the court. *Bro. tit. Oyer & Determiner* 8. and is a kind of *capias*, directed to the ſheriff of the county, commanding him to take the defendant, and have him before our lord the king, at Weſtminſter, on a certain day, to anſwer to the plaintiff on a plea of treſpaſs; which accuſation of treſpaſs gives the court juriſdiction in other civil cauſes; for when the defendant is in cuſtody of the marſhal, for the ſuppoſed treſpaſs, he is then a priſoner of the court, and may be here proſecuted for any other matter: not, that it is neceſſary, that he ſhould be an actual priſoner, but as ſoon as he appears, or puts in bail, to the proceſs, he is deemed ſo to be. 4 *Inſt.* 72. And for this reaſon, a treſpaſs is always ſuggeſted, whatever may be the cauſe of action.

To the proceſs of the court, the defendant muſt, in ſome inſtances, put in what is called common, and, in others, ſpecial bail; common bail are merely two imaginary perſons, John Doe, and Richard Roe; but if the plaintiff will make oath, that the cauſe of action amounts to ten pounds or upwards, he may arreſt the defendant, and make him find ſubſtantial ſecurities for his appearance, which are called *ſpecial bail.* On this head the ſtatute 13 *Car.* 2. *ſt.* 2. *c.* 2. requires, that the true cauſe of action be expreſſed in the body of the writ or proceſs, or no ſecurity can be taken above the value of 40 l. This ſtatute had, without any ſuch intention, like to have deprived this court of all its juriſdiction over civil injuries without force. For as the bill of Middleſex was framed only for actions of treſpaſs, the defendant could not be held to bail thereon, for breaches of civil contracts; but the officers of this court deviſed what is called, a cauſe of *ac etiam*, to be added to the uſual complaint of treſpaſs; the bill of Middleſex commanding the defendant to be brought

brought into court, to anſwer the plaintiff of a plea of treſpaſs, *and alſo*, to a bill of debt. *Tryes, Jus. Filizar.* 102. *Append.* 3. No. 3. *ſect.* 3.

Bill of Middleſex, when the Defendant is not to be held to Bail.

Middleſex to wit. } THE ſheriff is commanded to take *Benjamin Black* and *John Doe*, if they may be found in his bailiwick, and ſafely keep them; ſo that he may have their bodies before the lord the king at Weſtminſter, on Wedneſday next after the octave of Saint *Hilary*, to anſwer *William White*, in a plea of treſpaſs, and that he then have there this precept.

By bill

Stormont and Way.

Notice.

Mr. *Benjamin Black*, you are ſerved with this proceſs, to the intent, that you may, by your attorney, appear in his majeſty's court of king's bench at Weſtminſter, at the return thereof, being the twenty-third-day of *January* inſtant, in order to your defence in this action.

A. B. Inner Temple,
1ſt Jan. 1783.

If againſt huſband and wife, the notice muſt be to *appear for yourſelf and —— your wife.*

The bill of Middleſex, and other proceſs, being uſually printed in the plural number, it is common, in caſe there is but one defendant, to inſert the fictitious name of John Doe or Richard Roe, in order to prevent eraſures; obſerving to vary the chriſtian name of the fictitious, from that of the actual defendant.

Præcipe. Middleſex (ſs) bill for *William White* againſt *Benjamin Black.*

The defendant muſt be ſerved with a copy of the proceſs, and notice perſonally. 12 *G.* 1. *c.* 29. and ſervice on the return day, though after the court riſes, is good. 2 *Burr.* 812, 813.

If the proceſs be againſt ſeveral defendants, they muſt be all named in the notice, and copies ſerved on each defendant. It is not neceſſary to ſhew the party the original. *Str.* 877.

Bill of Middleſex Office, No. 6, Clifford's Inn.

Stamp, 2s. 6d. Signing. Term, 10d. Vacation, 6d.

Oath, when to hold to bail.

Bill of Middleſex, when the Defendant is to be held to Bail.

Middleſex } THE Sheriff is commanded to take
to wit. } *Benjamin Black*, and *John Doe*, if they may be found in his bailiwick, and ſafely keep them, ſo that he may have their bodies before the lord the king at Weſtminſter, on Wedneſday next after the octave of Saint *Hilary*, to anſwer *William White* in a plea of treſpaſs, and alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black* for fifty pounds upon promiſes, according to the cuſtom of the court of our lord the king, before the king himſelf, and that he have then there this precept. By Bill.

Stormont and Way.

The attorney's name and place of abode with the ſum ſworn to, muſt be indorſed.

Præcipe.

Middleſex (*ſs*) bill for *William White*, againſt *Benjamin Black*, in caſe for 50l. upon promiſe, returnable on Wedneſday next after the octave of Saint *Hilary*.

A. B. Attorney,
Inner Temple.

Oath for 25l.

The bills of Middleſex are ſigned, and the oath adminiſtred at the office, and warrants when to hold to bail, granted by the ſheriff of Middleſex. Office, Took's Courts, Curſitor Street, Chancery Lane.

If the defendant be not arreſted on this bill of Middleſex; an *alias*, and a *pluries* bill muſt be made out until taken, if in that county.

Alias

Alias Bill of Middleſex.

Middleſex to wit The ſheriff is commanded, as before he was commanded to take *Benjamin Black* and *John Doe, &c.*

Pluries Bill of Middleſex

Middleſex to wit. The ſheriff is commanded, as often times he has been commanded, to take *Benjamin Black* and *John Doe, &c.*

The *præcipe* muſt expreſs *alias* or *pluries* bill as the caſe may be.

If the defendant lives in any liberty where the ſheriff of Middleſex may not enter, ſuch as the liberty of Weſtminſter, a *non omittas* bill of Middleſex muſt be made out, upon which the ſheriff will grant his warrant to the high bailiff of Weſtminſter, to arreſt the defendant.

Non Omittas Bill of Middleſex.

Middleſex to wit. } THE ſheriff is commanded that he omit not by reaſon of any liberty in his bailiwick; but that he enter the ſame, and take *Benjamin Black* and *John Doe*, and ſafely keep them, ſo that he may have their bodies before the king at Weſtminſter, on Wedneſday next after the octave of St. *Hilary*, to anſwer *William White* in a plea of treſpaſs; and alſo to a bill of the ſaid *William White* to be exhibited againſt the ſaid *Benjamin Black* for 50l. upon promiſes according to the cuſtom of our court before us, and that he then have there this precept.

By Bill
Stormont and Way.

The *præcipe* muſt expreſs "*non omittas bill of Middleſex.*"

The affidavit and *præcipe* are always left at the office.

If the defendant be not found in Middleſex, a *latitat* muſt be ſued out into any other county, which if the defendant is to be held to bail, may be done on an office copy of the affidavit from the bill of Middleſex office.

This

This writ of *latitat*, is ſo called from reciting the bill of Middleſex, a d the proceedings thereon, and then reciting that it is teſtified, that the defendant *latitat et diſcurrit*, lurks and wanders in the county to the ſheriff of which the writ is directed; but as while the defendant is in Middleſex, the proceſs muſt be by bill of Middleſex only, ſo if he be originally proceeded againſt in any other county, the *latitat* is uſually ſued out upon a ſuppoſed, and not an actual bill of Middleſex, and is in fact the firſt proceſs of the court.

Latitat when the Defendant is not to be held to Bail.

George, the Third &c. to the ſheriffs of London greeting: Whereas we lately commanded our ſheriff of Middleſex, that he ſhould take *Benjamin Black* and *John Doe*, if they ſhould be found in his bailiwick, and ſafely keep them, ſo that he might have their bodies before us at Weſtminſter at a certain day now paſt, to anſwer *William White*, in a plea of treſpaſs; and our ſaid ſheriff of Middleſex at that day returned to us, that the ſaid *Benjamin* and *John* were not found in his bailiwick; whereupon, on the behalf of the aforeſaid *William*, it is ſufficiently teſtified in our court before us, that the ſaid *Benjamin* and *John* do lurk and ſecret themſelves in your county, therefore we command you, that you take them if they ſhall be found in your bailiwick, and ſafely keep them, ſo that you may have their bodies before us at Weſtminſter, on Monday next after eight days of the purification, to anſwer the ſaid *William* in the plea aforeſaid, and have you there then this writ. Witneſs William earl of Mansfield, at Weſtminſter, the 23d day of January, in the 23d year of our reign.

Stormont and Way.

Notice.

Mr. *Benjamin Black*, you are ſerved with this proceſs to the intent that you may, by your attorney, appear in his majeſty's court of king's bench, at the return thereof, being the twelfth day of February inſtant, in order to your defence in this action.

A. B. Inner Temple.

1 January, 1783.

Præcipe.

London, *to wit.* *Latitat* for *William White*,
againſt
Benjamin Black.

King's bench office, Inner Temple
Signer of the writs, J. Heberden.
Stamp, 2s. 6d. Signing, 2s. 6d. Oath, when neceſſary, 1s.
Seal office, No. 3. Inner Temple-lane.
Sealing, 7d.

This writ muſt be indorſed with the name and reſidence of the plaintiff's attorney, and the date when ſued out, and an exact copy ſerved on the defendant.

Latitat when the Defendant is to be held to Bail.

GEORGE the Third, &c. to the ſheriff of Surry, greeting: Whereas we lately commanded our ſheriff of Middleſex, that he ſhould take *Benjamin Black* and *John Doe*, if they might be found in his bailiwick, and ſafely keep them, ſo that he might have their bodies before us at Weſtminſter, at a certain day now paſt, to anſwer *William White* in a plea of treſpaſs, "And alſo to a bill of the ſaid *William*, "againſt the ſaid *Benjamin* for fifty pounds upon "promiſes, according to the cuſtom of our court "before us, to be exhibited," and our ſaid ſheriff of Middleſex at that day returned to us, that the ſaid *Benjamin* and *John* were not found in his bailiwick; whereupon, on the behalf of the aforeſaid *William*, it is ſufficiently teſtified in our court before us, that the ſaid *Benjamin* and *John* do lurk and ſecrete themſelves in your county: Therefore we command you, that you take them, if they ſhall be found in your bailiwick, and ſafely keep them, ſo that you may have their bodies before us at Weſtminſter, on Monday next after eight days of the purification, to anſwer the ſaid *William* of the plea and bill aforeſaid; and have you then there this writ. Witneſs William earl of Mansfield, at Weſtminſter, the twenty third day of January, in the twenty third year of our reign.

Stormont and Way.

The attorney's name and ſum ſworn to, indorſed.

Præcipe.

Præcipe.

London lat. for *William White* againſt *Benjamin Black*, tr. ca. for 50l. upon promiſes, returnable Monday next after 8 days of the purification.

A. B. Attorney.

The day the writ is ſued out, and the ſum ſworn to, muſt be indorſed thereon.

Warrant thereon, is granted,

In London, at the compters in Woodſtreet and the Poultry, 4d. In Surry, Kent, and Eſſex. at the offices of therespective ſheriffs, 6d. in any other county, 2s.

If the defendant is not found on this writ, before the return; an *alias latitat* iſſues, ſigned and ſealed as before

Alias Latitat.

George, &c. to the ſheriffs of London, greeting: We command you, as before we have commanded you, that you take *Benjamin Black* and *John Doe*, if they may be found in your bailiwick, and ſafely keep them, ſo that you may have their bodies before us at Weſtminſter, on Wedneſday next after fifteen days from the day of Eaſter, to anſwer *William White* of a plea of treſpaſs; and alſo to a bill of the ſaid *William* againſt the ſaid *Benjamin*, for fifty pounds upon promiſes, according to the cuſtom of our court before us to be exhibited, and have there then this writ. Witneſs William earl of Mansfield, at Weſtminſter the twelfth day of February, in the twenty ſecond year of our reign.

Stormont and Way.

Indorſed with the attorney's name and ſum ſworn to, *præcipe* as before, inſerting the words *alias latitat.*

If the defendant is not to be met with before the return, a *pluries latitat* iſſues, which is the ſame verbatim as the *alias latitat*, only inſtead of the words, "as before we have commanded you," it ſays "as we "have oftentimes heretofore commanded you."

If

If there is a liberty which the ſheriff cannot enter, a *non omittas latitat* iſſues.

Non omittas Latitat.

The *non omittas latitat* may iſſue in the firſt inſtance, and varies from the other *latitats* only by containing at the end of recital of the bill of Middleſex theſe words, "Therefore we command you that you do not omit, by reaſon of any liberty in your county, but that you enter the ſame, and take *Benjamin Black*," &c.

The *præcipe* muſt expreſs *non omittas latitat*. Signing, 2s. 6d. Sealing, 1s. 2d.

Latitat to the Counties Palatine.

The *latitat* to any of the counties palatine as Cheſter, Durham, or Lancaſter, runs thus:

Latitat to Cheſter.

George, &c. To our chamberlain of our county palatine of Cheſter, or to his deputy there, greeting: Whereas we lately commanded our ſheriff of Middleſex, that he ſhould take *Benjamin Black* and *John Doe*, if they ſhould be found in his bailiwick, and that he ſhould keep them ſafely, ſo that he might have their bodies before us at Weſtminſter, at a certain day now paſt, to anſwer *William White* of a plea of treſpaſs, and alſo of a bill to the ſaid *William* againſt the ſaid *Benjamin* for fifty pounds upon promiſes, according to the cuſtom of our court, before us to be exhibited; and our ſaid ſheriff at that day returned to us that the ſaid *Benjamin* and *John* were not found in his bailiwick, whereupon on the behalf of the ſaid *William* it is ſufficiently atteſted in our court before us, that the ſaid *Benjamin* and *John* lurk and ſecrete themſelves in your county palatine; therefore we command you, that by our writ under the ſeal of our ſaid county palatine, to be duly made, and to be directed to the ſheriff of the ſaid county palatine, you command the ſaid ſheriff, that he take the ſaid *Benjamin* and *John*, if they be found in his bailiwick,

and keep them ſafely, ſo that he may have their bodies before us at Weſtminſter, on Wedneſday next after the octave of Saint *Hilary*, to anſwer the ſaid *William White*, of the plea and bill aforeſaid, and have then there this writ. Witneſs William earl of Mansfield, at Weſtminſter, the twenty eighth day of November, in the twenty-third year of our reign.

Stormont and Way.

The *præcipe* is marked in the margin " County palatine of Cheſter, *lat.* for, &c.

Latitat to Lancaſter.

The *latitat* to Lancaſter is directed " To our chancellor of our county palatine of Lancaſter, or to his deputy there.

Latitat to Durham.

George, &c. To the reverend father in God *John*, by divine providence, lord biſhop of Durham, or to his deputy there, greeting (to the end of the recital of the bill of Middleſex), therefore we command you, that by your writ, under the ſeal of your biſhoprick, in due manner to be made and directed to the ſheriff of the county of Durham, you cauſe the ſaid ſheriff to be commanded, that he take the ſaid *Benjamin Black* and *John Doe* if they may be found, &c.

Latitat to the cinque ports.

Latitats to the cinque ports Haſtings, Romney, Hythe, Dover and Sandwich, and their dependencies Rye, Winchelſea and Seaford are directed.

To the conſtable of our caſtle of Dover, or to his deputy there, greeting: Whereas we lately commanded, &c. but inſtead of ſaying in your county ſay " bailiwick."

Cities and Towns having Sheriffs.

The cities of Briſtol, Coventry, Cheſter, York, Glouceſter, Lincoln, London, Norwich, and the town of Nottingham, have each two ſheriffs.

The cities of Canterbury, Exeter, Litchfield, and Worceſter, have each one ſheriff.

The

The towns of Kingſton upon Hull, Southampton, Pool, and Newcaſtle upon Tyne, have each one ſheriff.

Clauſes of ac etiam:

Debt.

And alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black* for 50l. debt, according to the cuſtom of the court of the lord the king, before the king himſelf.

Promiſe.

And alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black*, for 50l. upon promiſe. According, &c.

Treſpaſs.

And alſo a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black*, for taking and carrying away the goods and chattels of the ſaid *William White* to his damage of 50l. According to, &c.

Trover.

And alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black*, for converting and diſpoſing of the goods and chattels of the ſaid *William White*, to the value of 50l. According, &c.

Detinue.

And alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black*, for detaining the goods and chattels of the ſaid *William White*, to the value of 50l. According, &c.

Covenant.

And alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black*, for a breach of covenant, to the damage of the ſaid *William White*, of 50l. According, &c.

Assault.

And also to a bill of the said *William White*, to be exhibited against the said *Benjamin Black* for beating, bruising, wounding, and ill-treating the said *William White*, to his damage of 50l. According, &c.

On a recognizance of bail.

And also to a bill of the said *William White*, to be exhibited against the said *Benjamin Black*, in a plea of debt, on recognizance according to the custom of the court of our lord the king before the king himself.

In all process, the day and year of signing is to be set down thereon, 5 & 6 *W.* & *M.* *c.* 21. *s.* 3 9 & 10 *W.* 3. *c.* 25 *s.* 42 and the name of the attorney written on every writ or process, and writ of execution, and the warrants thereon. 2 *G.* 2. *c.* 23. *s.* 23. made perpetual by 30 *G.* 2. *c.* 19. *s.* 75. But the not subscribing the attorney's name on the warrant, shall not vitiate, provided the writ, &c. be regularly subscribed, and the sheriffs shall subscribe the attornies name on warrants, on penalty of five pounds. 12. *G.* 2. *c.* 13. *s.* 4.

Chap. VIII.

Of common Bail.

Of common bail.

COMMON bail is, as hath has been before observed, merely a form of appearance to the process of the court.

Common

Common Bail Piece.

Hilary Term in the 22d year of the reign of king *Geo.* III. *Stormont* and *Way.*
Middlesex } *Benjamin Black* having been served with
to wit. } process is delivered to bail.

to

John Doe of *London*, yeoman,
and
Richard Roe, of the same place, yeoman.

C. D.
attorney, 24,
Jan. 1783.

At the suit of
William White.

Written on parchment in the above form. Stamp, 2s. Filing, Term, 1s. 2d. Vacation, 1s. 6d.

Clerk of the common bails, king's bench office, Inner Temple.

Common bail must be filed by the defendant in eight days exclusive of the day of the return of the process, and if the defendant doth not file it in that time, the plaintiff may do it for him, on affidavit being made of the service, in such case these words must be inserted on the bail piece, under the attorney's name; "filed according to the statute."

Affidavit of service of Process.

William White, plaintiff,
In the King's Bench. and
Benjamin Back, defendant.

E F. clerk to *A. B.* of the Inner Temple, London, gentleman, attorney for the above named plaintiff, maketh oath and saith, that he did, on the 2d day of January instant, personally serve the above defendant with a true copy of a bill of Middlesex, issuing out of this honourable court, and returnable on Wednesday next after the octave of Saint

Hilary

Hilary under which ſaid copy was written, an Engliſh notice to the ſaid defendant, of the intent of ſuch ſervice, purſuant to the ſtatute in that caſe made and provided.

This affidavit may be ſworn before a judge of the court, or commiſſioner authorized, or clerk of the common bails. *Mich.* 10 *G.* 2. *ſtat.* 12 *G.* 2. *c.* 29. but in town, it is moſtly ſworn before the clerk of the common bails.

Affidavit, 1s. Filed, *gratis.*

Filing common bail voluntarily, invalid, unleſs a writ is ſued out in 14 days after ſuch appearance. *Trin.* 4 *W. & M.*

If baron and feme are ſued, the huſband muſt appear for himſelf and wife. *Str.* 693.

If an attorney undertakes to appear in writing, the court will order him ſo to do, or in default grant an attachment.

If a writ be ſerved on defendant by a wrong name, and he files common bail in his right name, he may be declared againſt by his right name; common bail muſt be filed on entering up a judgment upon a warrant of attorney, on pain of 10s. to the box. *Hil.* 1 *W. & M.*

Charge of filing common bail by the attorney to the plaintiff, 7s. 2d.

Chap. IX.

Of ſpecial Bail.

Affidavits to hold to ſpecial Bail.

In the King's Bench. *William White*, plaintiff, and *Benjamin Black*, defendant.

For money lent.

William White, of Lombard-ſtreet, London, carpenter, maketh oath and ſaith, that the above defendant

endant *Benjamin Black* is juſtly and truly indebted o this deponent, in the ſum of twenty-five pounds, or ſo much money lent and advanced by the depo- nent to the ſaid *Benjamin Black*.

For money laid out and expended.

—— For ſo much money paid, laid out, and ex- pended by this deponent for the ſaid *Benjamin Black*, t his requeſt.

For money had and received.

—— For ſo much money had and received by the aid *Benjamin Black*, for the uſe of this deponent.

For money due upon account ſtated.

—— For ſo much money due to this deponent, pon the ballance of an account ſtated by and be- ween the ſaid *Benjamin Black* and this deponent.

For work done and materials found.

—— For work and labour done and performed y this deponent, for the ſaid *Benjamin Black*, and or materials found and provided in and about the aid work.

For goods ſold and delivered.

—— For divers goods, wares, and merchandizes y this deponent, ſold and delivered to the ſaid *enjamin Black*.

For meat, drink, waſhing, and lodging.

—— For meat, drink, waſhing, and lodging, by is deponent found and provided, for the ſaid *enjamin Black*, at his requeſt.

For a ſurgeon's bill.

—— For the work and labour of this deponent as ſurgeon, in and about the healing and curing of he ſaid *Benjamin Black*, of a certain wound, and for ivers medicines, potions, and plaiſters neceſſary to the

the said cure, by this deponent found and provided for the said *Benjamin Black*, at his request.

For an apothecary's bill.

—— For divers medicines, and other things belonging to the business of an apothecary, by this deponent found and provided, administered, and applied to the said *Benjamin Black*, (or to his wife, child, servant, or family, as the case may be) at his request.

For depasturing of cattle.

—— For feeding, grazing, and depasturing of divers cattle of the said *Benjamin Black*, and at his request, from to , now last past.

For rent.

—— For the use and occupation of a certain messuage, or dwelling house, with the appurtenances, situate, lying, and being in , in the parish of Saint , in the county of , for the space of one year now elapsed.

For rent on lease.

—— For certain arrears of rent, due and owing from the said *Benjamin Black*, to this deponent; for the use and occupation of a certain messuage or tenement, with the appurtenances, situate, lying and being in , in the parish of , in the county of ; demised by indenture of lease, by this deponent, to the said defendant.

On promissory notes.

Drawee against drawer.

—— Upon a promissory note, drawn by the said *Benjamin Black*, payable to this deponent or order for value received (or as the note runs,)

Endorsee

Indorsee against drawer.

—— Upon a promissory note drawn by the said *Benjamin Black*, payable to *Richard Red*, or order, and by the said *Richard Red*, indorsed to this deponent.

Second indorsee against first indorser.

—— Upon a promissory note, drawn by one *George Green*, payable to *Richard Red*, or order, and by the said *Richard Red*, indorsed to the said *Benjamin Black*, and by him indorsed to this deponent.

On bills of exchange.

Drawee against acceptor.

—— As acceptor of a certain bill of exchange, drawn by one *Richard Red* upon the said *Benjamin Black*, payable to this deponent, or order, six months after the date thereof.

Indorsee against acceptor.

—— As acceptor of a certain bill of exchange, drawn by one *Richard Red*, upon the said *Benjamin Black* payable to one *George Green*, or order, and by the said *George Green* indorsed to this deponent.

Indorsee against drawer.

—— On a bill of exchange, drawn by the said *Banjamin Black* upon one *Richard Red*, payable to *George Green*, and by the said *George Green*, indorsed to this deponent.

In trover.

—— *William White* of &c. maketh oath and saith, that the said *Benjamin Black*, now has or lately had in his possession divers goods and chattels, (or the goods may be particularly set forth) of this deponent's, of the value of 25l. which said goods and chattels, the said *Benjamin Black* unjustly detains, or has unlawfully converted to his own use.

For journies, horse-hire and expences.

—— For divers journies taken by this deponent (or his servant, &c.) for the said *Benjamin Black*, at

his requeſt, and for horſe-hire and neceſſary expences in and about the ſaid journies.

For fees, &c. by an attorney.

—— For fees, work, and labour, money paid, laid out, and expended, journies and attendances of this deponent in and about proſecuting and defending divers ſuits and actions, and for drawing and engroſſing divers deeds and writings, and for money laid out about the ſame for the ſaid *Benjamin Black*, at his requeſt.

The like by the executor or adminiſtrator, &c. of an attorney.

—— Indebted unto this deponent as executor (or executrix) of the laſt will and teſtament, (or as adminiſtrator or adminiſtratix of all and ſingular the goods and chattels which were) of *George Green*, gent. deceaſed, for fees, work, labour, and journies of the ſaid *George Green*, in his life time, about the affairs of the ſaid *Benjamin Black*, and for money by him the ſaid *George Green*, in his life time about the ſame laid out and expended at the requeſt of the ſaid *Benjamin Black*.

For goods ſold in partnerſhip.

William White of Ludgate ſtreet, London, linen draper, maketh oath and ſaith, that the ſaid *Benjamin Black*, is juſtly indebted unto this deponent, *Richard Red*, and *George Green*, his partners, in the ſum of 25l. pounds, and upwards, for goods ſold and delivered.

The plaintiff's ſervants (if they know of the debts being contracted, or the goods delivered) may make affidavit for them.

Affidavit by plaintiff's ſervant for goods ſold and delivered.

Richard Red of, &c. ſervant to the above named *William White*, maketh oath and ſaith, that the above defendant, *Benjamin Black*, is juſtly indebted unto the ſaid *William White* in ten pounds for goods ſold and delivered

delivered, by the said *William White*, to the said *Benjamin Black*.

Affirmation of a Quaker, for goods sold.

William White of &c. (being one of the people called quakers) solemnly affirms, that the said *Benjamin Black* is indebted to this affirmant in the sum of 52l. for goods sold and delivered.

An affidavit must be full and explicit to the point sworn unto, and should contain the plaintiff and defendant's true name, place of abode and condition; and must be positive as to the debt sworn unto, altho' made by a third person, as a servant, an executor, &c.

Affidavit to hold the defendant to bail, in *assault, crim. con.* or the like, which is at the discretion of a judge, should state the particular circumstances of the case, and also the situation in life of the defendant, in order that a judgment might be formed, both of the propriety of granting the order for bail, and of the sum for which such bail should be taken; and the order, when obtained, is to be left with the officer who signs the writ, as his authority for signing the same. Stamp, 1s. 6d.

Of an Assault in order to procure a Judge's Order for special Bail.

WILLIAM White, of in the county of clerk, maketh oath, that on Friday, the day of last past, he this deponent going to view whether the tythe hay on the lands of *Benjamin Black* of aforesaid were ready to be set forth, he the said *Benjamin Black* did then in the said field, without any reasonable cause, in a violent manner assault, beat and throw down this deponent on the ground, this deponent making no opposition or resistance against the said *Benjamin Black*. But this deponent being rescued by some persons present from the said *Benjamin Black*, the said *Benjamin Black*, did again as soon as he got loose from the persons who rescued this deponent, a second time assault, throw down, beat and kick this deponent about

the head and body, ſo that the blood guſhed out of the deponent's ears, which occaſioned to this deponent the loſs of his ſpeech and hearing for ſome time, ſo as to render him incapable of performing his duty in the aforeſaid pariſh, he being miniſter of the ſame; and this deponent further ſaith, that the ſaid *Benjamin Black* is a perſon in very good circumſtances, and is poſſeſſed of a very conſiderable property, as this deponent hath been informed, and believes; and that the ſaid *Benjamin Black* hath not made this deponent any ſatisfaction for the ſaid aſſault.

Diſputes touching affidavits to hold to bail, are examinable by the court, or by a judge at chambers.

Affidavit in court, 1s. At chambers, 1s. 6d.

Of the Arreſt.

Of the Arreſt. None ſhall be held to bail under ten pounds, and affidavit (or affirmation) muſt be made and filed of the cauſe of action, which may be ſworn or affirmed before a judge, commiſſioner of the court, or the officer who ſhall iſſue the proceſs, or his deputy, and the ſum ſpecified in the affidavit, is to be indorſed on the back of the proceſs, and for which ſum the ſheriff is to take bail, and no more. 19 *Geo.* 3. *c.* 70. 12 *Geo.* 1. *c.* 29. 21 *Geo.* 2. *c.* 3.

In Wales, and counties palatine, none ſhall be held to bail under twenty pounds. 12 *W.* 3. *c.* 9.

Special bail, is not required in debt on a judgment, unleſs the debt or damages, without the coſts, amount to ten pounds; nor are any perſons to be arreſted, on actions on penal ſtatutes, or in covenant, unleſs by rule of court, or the covenant be for payment of money; nor in actions ag inſt bail, on the bail-bond, nor in treſpaſs, battery, wounding falſe impriſonment, privilege, (except for fees) or ſlander of title, (unleſs by order of court, or warrant from a judge) *Sid.* 307. *Rol. Abr.* 335. *Raym.* 74. *Lev.* 39. 4 *Burr.* 2117.

A defendant lawfully delivered from an arreſt, ſhall not, be again arreſted, at the ſuit of the ſame plaintiff. *Mich.* 15 *Car.* 2.

But

But after a *nonpros*, the defendant ſhall find bail, for the plaintiff ſuffers enough, by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before. *R. Ray* 679.

In an action for money loſt at play, ſpecial bail ſhall be given. *Str.* 1079.

Perſons not to be held to bail, in civil caſes.

Perſons not to be held to bail in civil caſes.

Peers of the realm, members of parliament, peereſſes by birth, members of convocation actually attending thereon, 8 *H.* 6. *c.* 1. biſhops, ambaſſadors, or other public miniſter, and their domeſtic ſervant 7 *Ann. c.* 12. 4 *Burr.* 2017. marſhal of the king's bench, warden of the Fleet, 1 *Vent.* 65. *Leon.* 37. clerks, attornies, and all other perſons attending the courts of juſtice, 4 *Inſt.* 71. 2 *Inſt.* 551. 12 *Mod* 163. clergymen performing divine ſervice, and not merely ſtaying in the church with a fraudulent deſign, 50 *Ed.* 3. *c.* 5. 1 *R.* 2. *c.* 16. ſuitors, witneſſes, and other perſons, neceſſarily attending any court of record upon buſineſs, *Sir T. Ray.* 101. *Vent.* 11. 1 *Mod.* 66. *are protected eundo and redeundo.* And it is ſaid, witneſſes properly ſummoned before commiſſioners of bankrupt to give evidence, an heir, executor, or adminiſtrator, *R. Mich.* 15 *Car.* 2. a bankrupt, 5 *Geo.* 2. *c.* 30. ſailor, 31 *Geo.* 2. *c.* 10. or volunteer ſoldier (unleſs the debt is twenty pounds).

Alſo the courts not only protect the perſons of their attendants, but likewiſe all thoſe things that are neceſſary for their journey, or the defence of their ſuit. 2 *Rol. Abr.* 273.

The privilege the courts allow their officers, is reſtrained to thoſe ſuits only, which they bring in their own right, or are brought againſt them in their own right; for if they ſue or are ſued as executors, or adminiſtrators, they are not entitled to privilege. *Hob.* 177. *Dyer.* 24. *pl.* 150. 2 *Sid.* 157. *Latch.* 199. *Godb.* 10.

If a privileged perſon brings a joint action, this deſtroys his privilege. 2 *Roll. Abr.* 274

A bankrupt is free from arreſt in going and coming to ſurrender to the commiſſioners, and from actual ſurrender for forty-two days, or ſuch further time

as

as ſhall be allowed to finiſh his examination (provided he his not in cuſtody at the time of ſurrender,) and if he be arreſted for debt, or on any eſcape warrant, coming to ſurrender, or after his ſurrender, within the time before mentioned, then on producing the ſummons, or notice, under the hands of the commiſſioners, and giving the officer a copy thereof, he ſhall be diſcharged; and if detained, ſuch bankrupt ſhall have for his own uſe five pounds, for every day he is ſo detained. Perſons who liſt themſelves on board any ſhip of war, ſhall not be taken out of the ſervice by any proceſs or execution (except for criminal matters), unleſs for a real debt, or other juſt cauſe of action, amounting to twenty pounds; and if any perſon be arreſted contrary, to the act, the judge of the court, on complaint of the party, or his attorney may diſcharge ſuch ſeaman without fees, upon proof that he was belonging to one of his majeſty's ſhips, and arreſted contrary to this act, and is to award coſts; but any plaintiff, on notice firſt given in writing of the cauſe of action to ſuch ſeamen, or left at his place of reſidence before his entering into the ſervice may file a common appearance in any action for debt, ſo as to proceed to judgment, and outlawry, and to have execution other than againſt the body. *Stat.* 1 *G.* 2. *c.* 14. *ſ.* 15, 16. 16 *G.* 2. *c.* 10. *ſ.* 27.

Of the bail bond.

When the defendant is arreſted he muſt either go to priſon or put in ſpecial bail to the ſheriff. This is done by entering into a bond to the ſheriff, with one or more ſureties, to inſure the appearance of the defendant at the return of the writ. The ſheriff may, if he pleaſes, let the defendant go without any ſecurities; but that is at his own riſque; for after taking him, the ſheriff is bound to keep him, ſo as to be forth coming in court, or an action lies for an eſcape.

If the defendant tender a ſufficient bail bond, the ſheriff is obliged to take it. 23 *H.* 6. *c.* 10. and ſhall take bail for no other ſum than ſuch as is ſworn to by

by the plaintiff and indorſed on the writ. 12 *Geo.* 1. c. 29.

Form of the Bail Bond.

Know all men by theſe preſents, that we *Benjamin Black*, of and *Richard Red*, of and *Bartholomew Brown*, of are held and firmly bound to ſheriff of the county of in the ſum of fifty pounds of lawful money of Great Britain, to be paid to the ſaid ſheriff, his certain attorney, executors, adminiſtrators or aſſigns; for which payment, well and truly to be made, we bind ourſelves, and each of us, by himſelf, for the whole and in groſs, our and each and every of our heirs, executors and adminiſtrators, firmly by theſe preſents, ſealed with our ſeals. Dated the day of in the year of the reign of our ſovereign lord George the third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and ſo forth, and in the year of our lord, 1783.

The condition of this obligation is ſuch, that if the above bounden *Benjamin Black*, do appear before the juſtices of our ſovereign lord the king, at Weſtminſter, on to anſwer to *William White* on a plea of debt, then this obligation ſhall be void, and of none effect, or elſe ſhall be and remain in full force and virtue.

Sealed and delivered, being
firſt duly ſtamped, in the
preſence of *Benjamin Black*, (L. S.)
W. X. *Richard Red*, (L. S.)
Y. Z. *Bartholomew Brown*, (L. S.)

Chap. X.

Of Bail above.

Of ſpecial bail.

THE defendant having been arreſted, and put in bail to the ſheriff, muſt, if the proceſs be in London or Middleſex, put in bail above within four days after the return.

Of

Special Bail Piece.

Hilary Term, in the 22d year of the reign of king *Geo.* III.

Middlesex } *Benjamin Black* is delivered to bail on
to wit. } a *capi corpus*
to
Richard Red, of *Cornhill*, *London*, linnen draper,
and
Bartholomew Brown, of *Cheapside*, *London*, goldsmith.

C. D. attorney, sworn to £.100. } At the suit of *William White*.

Stamp, 2s.

This bail is put in before a judge of this court, whose clerk will take the recognizance as follows.

"You do jointly and severally undertake that, if "*Benjamin Black* shall be condemned in this action, "at the suit of *William White*, he shall satisfy the costs "and condemnation money, or render himself into "the custody of the marshal of the Marshalsea, or "you will do it for him.

"Are you content."

In term, 4s. in vacation 6s.

Notice of bail being put in to be given to the attorney for plaintiff's attorney.

William White, plaintiff,
In the King's Bench. and
Benjamin Black, defendant.

Take notice, that special bail was this day put in for the defendant in this cause, before the honourable Mr. justice at his chambers in Serjeant's Inn, Chancery-lane, London, and the names are *Richard Red*, of Cornhill, London, linnen draper, and *Bartholomew*

Bartholomew Brown, of Cheapſide, London, goldſmith, dated the 25th day of January, 1783.

Your's, &c.

A. B. attorney for the defendant, Inner Temple.

To Mr. *C. D.*
attorney for plaintiff.

If the ſame as are bail to the ſheriff, "and they are the ſame as are bail to the ſheriff."

If the plaintiff be diſſatisfied with the bail above, and they be not the ſame as were bail to the ſheriff, he muſt except againſt them within twenty days after notice given, otherwiſe ſuch exception is void. *Mich.* 16 *Car.* 2. *Mich.* 8 *Ann.*

Exception muſt be in writing entered in the judge's book, before whom the bail was taken, and notice in writing muſt be given immediately to the defendant's attorney. *Eaſt.* 2 *G.* 2. and 5 *G.* 2. The entry in the judge's book is thus, "I except againſt theſe bail." *A. B.* plaintiff's attorney; and the notice to the defendant's attorney is, "I have excepted againſt the bail put in for the defendant in this cauſe.

A. B. plaintiff's attorney."

To Mr. *C. D.*
attorney for defendant.

In term the bail muſt juſtify within four days next after the exception delivered to defendant's attorney; and in vacation, on the firſt day of the next term, *Eaſt.* 5 *G.* 2. and notice muſt be given two days excluſive of ſuch juſtification; as for inſtance, if exception is entered againſt the bail on the firſt of February, notice is given to juſtify the fifth, ſuch notice muſt be delivered on the third of February, ſo that it is excluſive of one day, and incluſive of the other.

Notice if the ſame bail juſtify as are put in.

William White, plaintiff,
in the king's bench. and
Benjamin Black, defendant.

Take notice, that the bail already put in for the defendant in this cauſe, and of whom you have had notice, will, on Wedneſday next, juſtify themſelves, in

open court, at Weſtminſter-hall, in the county of Middleſex, as good bail for the defendant, dated this 3d day of February, 1783.

C. D. attorney
for defendant.

To Mr. *A. B.*
attorney for plaintiff.

If the bail already put in do not mean to juſtify, two more may be added to the bail already put in, and notice given of juſtifying them,

Notice of adding and juſtifying.

William White, plaintiff,
and
Benjamin Black, defendant.

In the king's bench.

Take notice, that *George Green* of Lombard-ſtreet, London, merchant, and *Benjamin Brown*, of Hackney, in the county of Middleſex, broker, will, on Wedneſday next, add themſelves to the bail already put in for the defendant in this cauſe; and at the ſame time will juſtify themſelves in open court, in Weſtminſter-hall, in the county of Middleſex, as good bail for the ſaid defendant, dated the 3d day of February, 1783.

Yours, &c,
C. D. attorney
for defendant.

To Mr. *A. B.*
attorney for plaintiff.

Theſe additional bail may be added in the Treaſury chamber, Weſtminſter, the ſame morning they juſtify. Adding bail 2s. each name. The bail piece muſt be taken to Weſtminſter, To the judge's clerk, for bringing down the bail-piece 2s. 6d.

If only one perſon is added to the bail already put in, and he with one of the other juſtifies, the notice is:

Notice to add one and juſtify.

William White, plaintiff,
and
Benjamin Black, defendant.

In the king's bench.

Take notice that *George Green* of Lombard-ſtreet, London, merchant, will on Wedneſday next, add himſelf to the bail already put in for the defendant in this cauſe, and that he together with *Richard Red*, one of

the

the bail already put in for the ſaid defendant, and of whom you have had notice, will at the ſame time juſtify themſelves in open court, Weſtminſter-hall, in the county of Middleſex, as good bail for the ſaid defendant, dated this 3d day of February, 1783.

Yours, &c.
C. D. attorney
for defendant.

To Mr. *A. B.*
attorney for plaintiff.

Affidavit of ſervice of notice.

To juſtify Bail in Court.

William White, plaintiff,
In the king's bench. and
Benjamin Black, defendant.

E. F. clerk to *C. D.* of &c. attorney for the defendant in this cauſe, maketh oath and ſaith, that he did, on the 23d day of February inſtant, perſonally ſerve *A. B.* the plaintiff's attorney with a true copy of the notice hereunto annexed.

If notice is ſerved on the ſervant or clerk of plaintiff's attorney; "ſerved Mr. *A. B.* the plaintiff's attorney in this cauſe, with a true copy of the notice hereto annexed, by delivering the ſame to the clerk or ſervant of the ſaid *A. B.* at his chambers in the Inner-Temple."

On the back of this affidavit muſt be indorſed the title of the cauſe, with inſtructions to counſel to move to juſtify the within bail. Fee, 10s. 6d. To the judge's clerk to bring down the bail piece, 2s. 6d. Swearing the bail in court by the maſter, 9s. Rule for allowance of bail, 4s. Clerk of the rules, Cowper, Symond's Inn.

The rule for the allowance of the bail muſt be ſerved on the plaintiff's attorney.

Bail may juſtify at a judge's chambers by conſent. Juſtifying bail at chamber, 2s.; Fee to plaintiff's attorney, for his conſent, 10s. 6d.

Of putting in bail in the country, and tranſmitting it.

The chief juſtice, &c. of the different courts, and chief baron of the exchequer ſhall, and may, by one or more commiſſion or commiſſions, from time to time empower ſuch, and ſo many perſons other than common attornies, and ſolicitors, as they ſhall think fit and neceſſary in all and every the uſual ſhires and counties, to take and receive ſuch recognizance of bail, as any perſon or perſons ſhall be willing or deſirous to acknowledge in any action or ſuit depending in the ſaid courts, in ſuch manner and form, and by ſuch recognizance or bail-piece as the juſtices and barons have uſed to take the ſame, which ſhall be tranſmitted to the court where ſuch action ſhall be depending, and upon affidavit made of the due taking of ſuch bail, by ſome credible perſon at the taking thereof, ſuch juſtice or baron ſhall receive the ſame. 4 & 5 *W. & M. c.* 4.

The juſtices and barons may make rules for juſtifying ſuch bail by affidavit, duly taken before the ſaid commiſſioners, who are thereby empowered, and required to take ſame, and alſo to examine the ſureties upon oath, touching the value of their reſpective eſtates. *Ibid. ſect.* 2.

Juſtices of aſſize in their circuit, may take ſuch bail in a ſimilar manner. *Ibid ſect.* 1.

It is felony for one to be bail in another's name. *Ibid. ſect.* 4.

County bail, when to be put in and tranſmitted.

The defendant hath ſix days next after the return of the proceſs, to put in ſpecial bail; and if within forty miles of London, eight days to tranſmit it, if above forty miles, then fifteen days to tranſmit it, after the taking thereof. *Trin.* 8 *W.* 3.

The bail-piece as before, is taken to a commiſſioner of the court, who takes the recognizance. Recognizance 6s. affidavit muſt be then made of the due taking of ſuch recognizance and the bail-piece annexed to it, and

and ſworn before a commiſſioner for taking affidavits.

Affidavit of due taking bail in the county.

William White, plaintiff.
In the king's bench. and
Benjamin Black, defendant.

John Nokes of *Chelmsford*, in the county of *Eſſex*, gentleman, maketh oath and ſaith, that the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by *Richard Red* of *Chelmsford* aforeſaid, grocer, and *Bartholomew Brown* of the ſame place, farmer, before *Thomas Stiles*, Eſquire, the commiſſioner, who took the ſame in this deponent's preſence the fifth day of February laſt paſt.

The affidavit muſt be ſworn before a commiſſioner for taking affidavits.

Affidavit of juſtification.

William White, plaintiff,
In the king's bench. and
Benjamin Black, defendant,

Richard Red of *Chelmsford*, in the county of *Eſſex*, grocer, and *Bartholemew Brown* of the ſame place, farmer, bail for the defendant in this cauſe, ſeverally make oath and ſay, and firſt this deponent *Richard Red*, for himſelf ſaith, that he is a houſekeeper in *Chelmsford* aforeſaid, and that he this deponent is worth fifty pounds over and above what will pay all his juſt debts; and this deponent *Bartholomew Brown* for himſelf ſaith, that he is a houſekeeper at *Chelmsford* aforeſaid, and is worth fifty pounds, over and above what will pay all his juſt debts.

This affidavit may be ſworn before the commiſſioner appointed to take the bail.

The bail-piece, and the affidavit of the due taking thereof muſt be filed with one of the judges of the court, filing bail piece 5 s. in term, and 2 s. more in vacation, and notice muſt be given to plaintiff's agent with a copy of the affidavit of juſtification.

Notice

Notice of ſuch bail and affidavit being filed with the judge.

William White, plaintiff.
In the king's bench. and
Benjamin Black, defendant,

Take notice that ſpecial bail in this cauſe was on the day of put in before *Thomas Sitles* Eſq. a commiſſioner appointed for the taking of ſpecial bail, in and for the county of Eſſex, and the names of the bail are *Richard Red*, of, &c. and *Benjamin Brown*; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the right honourable William earl of Mansfield, at his chambers in Serjeants Inn, Chancery-lane, London, dated the day of 1783.

Yours &c.
C. D. Agent for defendant.

To Mr. *A. B.* agent
for the plaintiff.

Exception and notice of juſtification.

The plaintiff may except againſt theſe bail the ſame as in London and Middleſex, within twenty days, and notice muſt be given of juſtification as before, only adding the words, "by affidavit." Affidavit muſt alſo be made of the ſervice of notice, a motion made by counſel; the affidavit and bail-piece taken to Weſtminſter, and the clerk of the papers reads it, filing 9s.

Within what time bail-piece to be filed.

When the bail is completed, the bail-piece muſt be filed within twenty days after, by the attorney who puts it in, under the penalty of 40s. *Trin.* 13 *Car.* 2. If the bail is juſtified in court, the maſter's clerk hath the bail-piece; if juſtified at chambers, the judge's clerk, 1s. and it is filed with the clerk of the ſpecial bail, at the king's bench office, filing 4d.

If the plaintiff be diſſatisfied with the bail taken by the ſheriff upon the arreſt, and the ſame perſons become bail above, the plaintiff is not bound to accept them

them; but in order to compel a juſtification, he muſt enter an exception, and ſerve the ſheriff with a rule to return the writ, and upon the ſheriffs return of *cepi corpus*, the plaintiff may ſerve him with the like rule to bring in the body.

Every bail taken before or upon the continuance day, is a bail, and to be filed of the preceding term, and every bail taken after the continuance day, is a bail, and to be filed of the ſubſequent term, and not otherwiſe; but where new bail is added to the other bail taken, on or before the continuance day, in that caſe ſuch new bail ſhall be taken and filed as of that term in which the bail was firſt put in.

If no exception to bail is made within a proper time, the defendants may make affidavit of the ſervice of notice, that ſuch bail was put in, upon the back of the bail-piece (for which oath no fee is to be taken), and file the ſame with the maſter.

Proceedings on the Bail Bond.

If bail be not put in, or if excepted againſt, and do not juſtify in time, the plaintiff's attorney may apply to the under ſheriff for an aſſignment of the bail-bond, *ſtat. 4 and 5 Ann. c. 16. ſ. 20.* Aſſignment London and Middleſex, 5s. other counties 6s. 8d. poſtage, 1s. Aſſignment of the bail bond.

Action thereon. Before an action is brought it muſt be on the bail-bond, ſtampt with a double ſixpenny ſtamp, and, "the plaintiff is named aſ-"ſignee to the ſheriff," and the action muſt be brought in the ſame court where the original writ is. *3 Burr. 1923. 1 Burr. 642.*

There are no proceedings had in the original action, after the aſſignment of the bail-bond.

The bail to the ſheriff may, at the return of the writ, put in bail before a judge (againſt the defendant's conſent;) in order to perform the condition of the bail-bond; and may take up the defendant and ſurrender him in diſcharge of themſelves. *Str. 876.*

Terms on which the court will ſtay proceedings on the bail-bond.

Upon the defendant and the bail being ſerved with proceſs, a ſummons may be taken out for the ſtay of proceedings againſt the bail, upon

upon payment of coſts, and ſuch ſummons muſt be intitled in the original action: if plaintiff has not been delayed ſo as to loſe his trial, the judge will make an order to ſtay the proceedings upon perfecting bail in the original action, pleading iſſuably, and taking ſhort notice of trial, for the ſitting in term, and paying coſts to be taxed by the maſter.

But if the plaintiff has loſt a trial, the court will further require that the bail-bond ſhall ſtand as a ſecurity for the plaintiff's debt and coſts if he recovers.

At the ſame time notice muſt be given to put in, and juſtify bail, which may be done the ſame day the ſummons is taken out; the notice muſt be two days excluſive, as ſoon as the bail have juſtified, an appointment muſt be got from the maſter to tax the coſts, which muſt be directly done, and paid as it is a conditional order only, and lies upon the defendant to perform.

If the bond is irregularly aſſigned, the court may be moved to ſet the proceedings aſide for irregularity, upon an affidavit, ſtating the particular facts.

Chap. IX.

Of compelling the ſheriff to return the writ, and bring in the body of the defendant.

ALTHOUGH the ſheriff is obliged to enlarge, the defendant after he hath been arreſted, upon ſuch defendant's tendering him ſufficient ſecurities, yet the plaintiff is by no means concluded by ſuch act of the ſheriff, but hath his option either to take an aſſignment of the bail-bond, or may have a compulſive proceſs againſt the ſheriff, to oblige him to return the writ, and bring in the body of the defendant.

The ſheriffs of the different counties having neglected to return their writs in due time, it was enacted, that in ſuch caſes a complaint ſhould be made to the juſtices, and a writ ſhould go unto them to enquire whether ſuch writ was executed or not; and if executed, and not returned, the demandant ſhould have his damages awarded. 13 *Ed.* 1. *c.* 39.

If

If ſheriffs return upon any perſon, *cepi corpus*, or *reddidit ſe*, they ſhall have the bodies at the returns of the writs. 23 *H.* 6. *c.* 10.

Every ſheriff ſhall, after term, return into court all writs, and in default expect judgment for contempt. *Rule, Eaſter*, 6. *Jac.* 1.

But ſheriffs, bailiffs of liberties, and their deputies ſtill delaying execution of proceſs, and return thereof; a rule was made that if it ſhould appear that any ſuch officer ſhould wilfully delay the execution, or return of proceſs, or execution; or having levied money, ſhould detain it after the returns, beſides the ordinary courſe of amercements, &c. an attachment, &c. ſhould be as the caſe requires. *Michaelmas* 1654.

All ſheriffs upon being ſerved with a rule peremptorily to return any writ, iſſuing out of this court, or to bring in the body of any defendant, are to return the writs within ſix days after notice of the ſame, or they ſhall be liable to an attachment without further rule. *Mich.* 6 *Geo.* 2.

The ſheriffs of London and Middleſex are to return the writs in four days next after the ſervice of the rule, and to bring in the body within four days next after ſervice of a rule for that purpoſe, or be liable to an attachment. *Rule. Trin.* 6 *Geo.* 3.

The laſt rule having made no alteration reſpecting any other cities, towns and counties; they have ſix days, as heretofore.

If the plaintiff be diſſatisfied with the bail given to the ſheriff he may, upon the return day of the writ, get a rule from the clerk of the rules to return the ſame. Rule, 4s.

A copy of this rule muſt be ſerved on the deputy ſecondary, if in London, at the office where the warrant is taken out, viz. the Poultry or Wood-ſtreet; if in Middleſex, on the under ſheriff; (on which copy is to be put the officer's name who arreſted the defendant), and at the expiration of the rule, ſearch is to be made at the treaſury chamber, Weſtminſter-hall, with the *returna brevium* for the return of writ, if the ſheriff has returned *cepi corpus*, if bail

is put in, in due time, the bail are to be excepted againſt (but not otherwiſe), and a rule got to bring in the body with a copy of which rule the ſheriff is to be ſerved, and if the bail is not juſtified in due time, (at the expiration of the four days next after the ſervice), on affidavit thereof, counſel is to move for an attachment againſt the ſheriff for not bringing in the body, "purſuant to the rule."

Affidavit of ſervice of rule to bring in the body to move for attachment.

William White, plaintiff,
In the king's bench. and
Benjamin Black, defendant.

E. F. clerk to *A. B.* of the Inner Temple, gentleman, attorney for the plaintiff in this cauſe, maketh oath and ſaith, that he did on the day of inſtant, perſonally ſerve with a true copy of the rule hereunto annexed, which ſaid is or acts as the deputy ſecondary of compter, (or under ſheriff of the county of) and this deponent further ſaith, that bail above was put in, but that the ſame is not perfected.

This rule is had at the clerk of the rules, and taken it to the crown-office, where one of the clerks makes out the attachment. Attachment, 13s. 4d.

N. B. No one particular clerk does this, therefore the general rule is to take your own clerk in court, for which you pay him as above.

If no bail is put in, either by the ſheriff or the defendant, then after the rule to bring in the body is expired the following affidavit is to be made.

Affidavit when no bail is put in.

E. F. of, &c. maketh oath and ſaith, that he did on the day of inſtant, perſonally ſerve with a true copy of the rule hereunto annexed, at the ſame time ſhewing him the ſaid original rule, and this deponent further ſaith, that no bail above has been put in for the ſaid defendant.

Proceſs

Proceſs if ſheriff be out of office.

The ſheriff is not bound to return his writs after he has been ſix months out of office, 20 G. 2. c. 37. therefore if he is out of office before he is called upon for a return of the writ, a rule may within the ſix months be had upon him, (naming him as the late ſheriff), to return the writ, which is to be ſerved as before; and if he returns *cepi corpus*, then, in order to compel him to bring in the body, a *diſtringas* is to be ſued out, directed to the preſent ſheriff, to diſtrain the late ſheriff for that purpoſe.

Diſtringas againſt the late ſheriff to bring in the body.

George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth, to the ſheriffs of London, greeting: We command you, that you diſtrain and , late ſheriffs of our ſaid city, by all their lands and chattels in your bailiwick, ſo that neither they, nor any of them lay hands thereon, until you ſhall have received another command from us in reſpect thereof, and that you anſwer to us the value and iſſues, ſo that the ſaid and the ſaid late ſheriffs, have before us on the body of *Benjamin Black* by them taken, and in their cuſtody detained, as by return, ſome time ſince ſent into our court before us at Weſtminſter, they have charged themſelves, to anſwer to *William White* in a plea of treſpaſs; and alſo to a bill of the ſaid *William White*, to be exhibited againſt the ſaid *Benjamin Black* for 50l. upon promiſes, according to the cuſtom of our court before us, and to hear judgment for their many defaults, and have there then this writ. Witneſs William earl of Mansfield, at Weſtminſter, the day of , in the year of our reign.

Præcipe for the above Writ.

London. *Diſtringas* for *William White* againſt and late ſheriffs of the city of London, returnable on .

If a bill of Middleſex iſſued againſt the defendant, the writ is directed to the ſheriff of Middleſex, to diſtrain the late ſheriff, according to above form only changing the county and names.

If the proceedings were by ſpecial *capias* that iſſued, and on which defendant was arreſted, (which proceſs will be particularly treated of hereafter), then the filazer, makes out the the *diſtringas*, which ſets forth the whole of the original writ; this is left with the ſheriff at his office, who return of courſe on it, forty ſhillings iſſues; an *alias diſtringas*, is then ſued out, adding the words ("as before we have commanded you"); before this is left with the ſheriff, motion at the ſide bar muſt be made, to increaſe the iſſues: Or on motion by counſel for that purpoſe, which may be made, informing the court of the amount of plaintiff's debt, and producing the *diſtringas*, and the amount of the coſts; if the debt be ſmall, the court will order the whole. The ſheriff is to be ſerved with copy, leaving at the ſame time the *alias* writ of *diſtringas*: If the court do not give the whole of the demand, and coſts, a *pluries diſtringas*, muſt be made out, and the court moved again to increaſe the iſſues, and the proceeding muſt be by *pluries*, until the plaintiff is ſatisfied: Upon having ſufficient iſſues returned, affidavit is made of the ſeveral writs of *diſtringas* iſſuing, and of the returns thereon; and counſel is to move the court in purſuance of the act of 10 *Geo.* 3. *c.* 50. for a rule to ſhew cauſe "why the iſſues returned upon the ſeveral writs of "*diſtringas* ſhould not be ſold, and the monies ariſ-"ing from the ſale thereof, ſhould not be forthwith "brought into court, and why it ſhould not be re-"ferred to the maſter to tax the plaintiff his coſts, oc-"caſioned by his iſſuing out the ſeveral writs; and "why the coſts, when taxed, ſhould not be paid out "of the monies ſo brought into court, and why the "ſurplus of the ſaid money, after payment of the ſaid "coſts, ſhould not be retained in court until the pur-"poſe of the ſaid writs are anſwered," the ſheriff is to be ſerved with a copy, and on the day of ſhewing

cauſe counſel may move to make the rule abſolute upon affidavit of ſervice, annexed to the original rule.

Affidavit of the writs of Diſtringas having iſſued, and ſheriffs return.

A. B. of &c. attorney for the plaintiff in this cauſe, maketh oath and ſaith, that three ſeveral writs of *diſtringas*, have iſſued againſt , and , late ſheriffs of the city of London, to bring in the body of the above defendants, and that the ſheriffs have returned iſſues thereon, to the amount of ; (as appears by the returns thereof annexed).

Before the ſheriff is fixed, one *diſtringas* muſt lay four days in the office excluſive of the return, and uſually the firſt *diſtringas* is ſo left.

The ſheriff, in order to ſave himſelf, may put in bail for the defendant (againſt his conſent), upon receiving the rule to bring in the body, and juſtify the ſame, and it is ſaid the bail may take defendant, and and render him.

If bail above ſhould be put in, in due time, and no notice thereof given, the plaintiff muſt firſt except againſt the bail, and give notice to defendant's attorney, before ſervice of the rule to bring in the body.

The rule to bring in the body being expired and the bail not having juſtified, an affidavit muſt be made, ſtating the ſervice of the rule on the under ſheriff, or ſecondary.

Affidavit for attachment where bail is put in, but not juſtified.

"And this deponent further ſaith, that the ſaid "defendant did put in bail above, but hath not juſ- "tified the ſame, and the rule hereunto annexed "ſince the ſervice thereof is expired."

When the attachment is made out at the crown-office, a bill of coſts muſt be drawn out, adding a fee of 2l. 2s. and 2s. 6d. for the warrant, which is to executed by the coroner.

If

If the coroner doth not pay the money at the return of the writ, a rule for the coroner to return the attachment is alſo made out at the crown-office; a copy of which he is to be ſerved with; and if he doth not then return the attachment, on affidavit of ſuch ſervice, the court will grant an attachment to be executed by two or more perſons named therein, who are ſtiled eliſors.

Chap. X.

Of the declaration.

THE declaration (*narratio* or count, anciently called the *tale*) is an amplification of the original writ upon which the action is founded, with the additional circumſtances of time and place, when and where the injury was committed; but when the defendant is brought into court for the ſuppoſed treſpaſs, which gives the court juriſdiction; the plaintiff may declare in whatever action, or charge him with any injury he ſhall think fit, unleſs he ſhall have held him to bail by a ſpecial *ac etiam*, which he is then bound to purſue.

It is the cuſtom, in actions upon the caſe, to ſet forth ſeveral different caſes by different counts in the ſame declaration, that if the plaintiff fail in the proof of one, he may recover on another.

Thus, in an action on the caſe upon an *aſſumpſit*, for goods ſold and delivered, the firſt count uſually is *indebitatus aſſumpſit*; that is, for a ſettled price agreed upon between the plaintiff and the defendant; as that they had bargained for 25l. which the defendant had undertaken to pay for ſuch goods; but leſt the plaintiff ſhould fail in the proof, on that count he next counts upon a *quantum valebant*; that is, alledges that the defendant bought of him certain other goods, and agreed to pay ſo much money as ſuch other goods were worth; and avers that they were worth another

another ſum of 25l. and then proceeds to other counts, as for work and labour, money lent, money laid out and expended, money received by the defendant for the uſe of the plaintiff, money due upon an account ſtated, or ſuch other counts as ſhall be adapted to the nature of the caſe; and at laſt concludes by declaring that the defendant refuſes to fulfil any of the agreements ſtated in the declaration, by which he, (the plaintiff), ſuſtains damage to a certain value; and if the plaintiff ſhall prove the caſe laid in any one of the counts, he will recover damages thereon, although he ſhould fail in proof of the reſt: and the declaration always concludes, "and therefore he (the plaintiff) brings ſuit, &c." which formerly meant the witneſſes of the plaintiff, *Seld. on Forteſc. c.* 21. for the law would not then compel defendant to anſwer the charge until the plaintiff had made out a probable cauſe of action, *Bract.* 400. *Fiet. l.* 2. *c.* 46. But the *ſuit*, *ſecta*, or *followers*, are not now produced, although the form ſtill continues.

At the end of the declaration are alſo added the plaintiff's pledges of proſecution, which are now *John Doe* and *Richard Roe*; but were formerly actual ſecurities to anſwer for the amercement of the plaintiff, in caſe he was nonſuited, barred, or had a verdict and judgment againſt him. 3 *Bulſt.* 275. 4 *Inſt.* 189. for if the plaintiff neglects to deliver a declaration for two terms, after the appearance of the defendant, or makes any ſubſequent default againſt the rules of the law, a *non ſuit* is entered; and he ſhall for making a falſe claim, pay coſts to the defendant, and be liable to be amerced to the king. Formerly the demiſe of the king determined all the ſuits then depending in his courts, and the plaintiff was obliged to ſue out a freſh writ from his ſucceſſor; but the ſtatute, 1 *Ed.* 6. *c.* 7. enacts, that by the death of the king no action ſhall be diſcontinued; but that all proceedings ſhall ſtand good as if the ſame king had been living.

Declarations.

For goods ſold and delivered, money laid out and expended, and money lent and advanced.

Hilary Term in the twenty-third year of the reign of king George *the third.*

Stormont and Way.

1ſt count. London, ſs. *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the marſhalſea of our ſovereign lord the king, before the king himſelf, for that Whereas the ſaid *Benjamin* on the 1ſt day of January, in the year of our lord 1783, at London aforeſaid, in the pariſh of St. Mary Le Bow, in the ward of Cheap, was indebted to the ſaid *William* in the ſum of 50l. of lawful money of Great Britain, for divers goods, wares, and merchandizes of the ſaid *William*, by the ſaid *William*, to the ſaid *Benjamin*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, before that time ſold and delivered; and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, took upon himſelf, and to the ſaid *William*, then and there faithfully promiſed, that he the ſaid *Benjamin*, would well and faithfully pay and ſatisfy to the ſaid *William*, the ſaid ſum of 50l. whenever after he ſhould be thereto requeſted. *And*

2d count. *Whereas Alſo* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William*, had before that time, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, ſold and delivered to the ſaid *Benjamin*, divers other goods, wares, and merchandizes of him the ſaid *William*, took upon himſelf, and to the ſaid *William*, then and there faithfully promiſed, that he the ſaid *Benjamin*, would well and faithfully pay and ſatisfy to the ſaid *William*, ſo much money as the goods, wares, merchandizes laſt mentioned, at the time of the ſale and delivery thereof, were reaſonably worth, whenever after he ſhould be thereto requeſted; and

nd the ſaid *William* avers, that the ſaid goods, wares, nd merchandizes laſt mentioned, were, at the time of the ſale and delivery thereof, reaſonably worth nother ſum of 50*l.* of like lawful money of Great Britain, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, from the ſaid *William* had notice. *And whereas alſo* 3d Count. afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, the ſaid *Benjamin* was indebted to the ſaid *William* in the further ſum of 50*l.* of like lawful money of Great Britain, for ſo much money of the ſaid *William*, by the ſaid *William*, to and for the uſe of the ſaid *Benjamin*, before that time paid, laid out, and expended; and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook and to the ſaid *Wiliiam* then and there faithfully promiſed that he the ſaid *Benjamin*, the ſaid ſum of 50*l.* laſt mentioned, to the ſaid *William*, whenever after he ſhould be thereto requeſted, would well and faithfully pay and content; *And whereas alſo* the ſaid 4th Count. *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other 50*l.* of like lawful money of Great Britain, for money by the ſaid *William* before that time lent and advanced to the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin* in conſideration thereof afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook and to the ſaid *William*, then and there faithfully promiſed that he the ſaid *Benjamin* the ſaid ſum of 50*l.* laſt mentioned, to the ſaid *William*, whenever after he ſhould be thereto requeſted would well and faithfully pay and content; *nevertheleſs*, the ſaid *Benjamin* the ſeveral promiſes and undertakings by him in form aforeſaid reſpectively made, in no wiſe

regarding, but contriving and fraudulently intending the ſaid *William* in this behalf, craftily and ſubtlely to deceive and defraud, the ſaid ſeveral ſums of money, or any part thereof to the ſaid *William*, hath not paid, nor him for the ſame in any manner hitherto contented, although the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, and often afterwards, at London aforeſaid, in the pariſh and ward aforeſaid, by the ſaid *William* was requeſted ſo to do, but the ſame to him to pay, or him for the ſame in any manner to content, he the ſaid *Benjamin* hath hitherto wholly refuſed, and ſtill doth refuſe, to the damage of the ſaid *William* of 100*l.* And therefore he brings ſuit, &c.

A. B. For the plaintiff,
C. D. For the defendant.
Treſpaſs on the Caſe.
} Pledges to proſecute { *John Doe*, and *Richard Roe.*

Obſervations.

The above declaration is for goods ſold and delivered, money laid out and expended, and money lent and advanced, which ſeveral cauſes of action ſet forth in the ſeveral counts of the declaration. Thus the firſt count is for goods ſold and delivered, ſtating the price of thoſe goods at a ſpecific ſum, as agreed upon between the plaintiff and the defendant; but as in order for the plaintiff to recover on this count, it would be neceſſary for him to bring proof, not only as to the delivery of the goods, but alſo as to ſuch agreement with reſpect to the price thereof, the ſecond count declares, that the plaintiff having ſold certain other goods to the defendant, the defendant undertook to pay for ſuch other goods, not a ſpecific ſum, as in the former count, but ſo much as ſuch other goods were reaſonably worth, ſo that upon the ſecond count, it will be only neceſſary for the plaintiff to bring proof of the delivery, and of the value of the goods, and he will not be put to prove any agreement whatever, between himſelf and the defendant, with reſpect to the price. The third count is for money paid, laid out, and expended, to, and for the uſe of

the defendant: a count which will apparently comprehend a variety of tranſactions whereby the defendant may have become indebted to the plaintiff. and the fourth is for money lent and advanced by the plaintiff to the defendant, proof as to either of which counts will enable the plaintiff to recover thereon. It may be obſerved that each count in the declaration is not that the defendant is indebted in ſo much to the plaintiff, and therefore that the plaintiff ought to recover ſuch ſum of the defendant, for then it would be an action of debt, (the difficulties under which the plaintiff labours in ſuch action, when brought upon ſimple contract, we have before ſtated) but each count is that the defendant having been indebted to the plaintiff in ſuch a ſum, or for certain goods, either at a price agreed upon, or according to the value of ſuch goods, has undertaken to pay ſuch ſum, or the value of the goods, to the plaintiff, for the breach of which undertaking, or *aſſumpſit*, the action is brought.

There are certain other uſual and accuſtomary counts, as for work and labour done, and materials found and provided under a ſpecific agreement as to price; then for ſo much money as the plaintiff deſerves to have of the defendant for work, labour, and materials; for work and labour generally at a ſpecific ſum; then for what the plaintiff deſerves to have for Work and labour; upon an account ſtated between the plaintiff and the defendant; and for money had and received by the defendant to the uſe of the plaintiff. which laſt count, as the law conſtrues every ſum which any one has had and received for another, without any valuable conſideration upon the part of the receiver, to be money had and received for the uſe of the owner only, and implies that the perſon ſo receiving undertook to account for it to the true proprietor, is obſerved by Blackſtone to be almoſt as univerſally remedial as a bill in equity.

We ſhall therefore now proceed to give the forms of ſuch counts, and then, (after ſome few neceſſary remarks,) by precedents of various declarations ſettled by the moſt eminent pleaders, to inſtruct the practitioner as to their uſe and application, who ſhould

not on the one hand omit any count that may enable the plaintiff to recover his demand of the defendant, nor ſhould he on the other enhance the expence of the proceedings by an unneceſſary length of the declaration.

Common Counts.

Indebitatus aſſumpſit, for work, labour, and materials, at a certain ſum.

And whereas the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William*, in the ſum of fifty pounds, of lawful money of Great Britain, for the work, labour, care and diligence of the ſaid *William*, by him the ſaid *William*, before that time done and performed and beſtowed in and about the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and for divers materials and other neceſſary things found, provided, uſed and applied in and about the ſaid work, at the requeſt of the ſaid *Benjamin*, and being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay to him the ſaid *William*, the ſaid ſum of fifty pounds, when he the ſaid *Benjamin* ſhould be thereto afterwards requeſted.

Quantum meruit.

And whereas, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William*, at the like requeſt of the ſaid *Benjamin*, had before that time done, performed, and beſtowed, other his work and labour, care and diligence, in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and had before that time, found and provided, uſed, and applied, divers other materials, and other neceſſary things, in and about that work, he the ſaid *Benjamin* then and there undertook, and faithfully promiſed the ſaid *William* to pay to him, the ſaid *William*, ſo much money, as he the ſaid *William* therefore reaſonably deſerved to have, and the ſaid *William* avers, that he the ſaid *William* therefore reaſonably deſerved to have of the ſaid *Benjamin*, other fifty pounds of like lawful money,

to

to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, there had notice.

And whereas the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other fifty pounds of like lawful money, for other his work and labour, care and diligence, in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay to him, the ſaid *William*, the ſaid laſt mentioned ſum of fifty pounds, when he the ſaid *Benjamin* ſhould be thereto afterwards requeſted. For work and labour, generally at a certain ſum.

And whereas afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William* at the like requeſt of the ſaid *Benjamin*, had before that time done, performed, and beſtowed, other his work and labour, care and diligence, in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, he the ſaid *Benjamin*, then and there undertook, and faithfully promiſed the ſaid *William*, to pay to him the ſaid *William*, ſo much money as he, the ſaid *William*, therefore reaſonably deſerved to have; and the ſaid *William* avers that he, the ſaid *William*, therefore reaſonably deſerved to have of the ſaid *Benjamin* other fifty pounds of like lawful money, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, there had notice. *Quantum meruit.*

And whereas the ſaid *William*, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, accounted together with the ſaid *Benjamin*, of and concerning divers other ſums of money, before that time due and owing from the ſaid *Benjamin* to the ſaid *William*, and being then in arrear and unpaid; On account ſtated.

and

and upon ſuch account the ſaid *Benjamin* was then found in arrear to the ſaid *William* in a large ſum of money, to wit, in the ſum of fifty pounds; and being ſo found in arrear to the ſaid *William*, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed to the ſaid *William* to pay to him the ſaid *William* the ſaid ſum of fifty pounds, whenever he the ſaid *Benjamin* ſhould be thereunto requeſted.

For Money had and received.

And whereas the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other fifty pounds, of like lawful money of Great Britain, for ſo much money by the ſaid *Benjamin* before that time had and received, to the uſe of the ſaid *William*; and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay to him the ſaid *William*, the ſaid ſum of fifty pounds, whenever he the ſaid *Benjamin* ſhould be afterwards thereto requeſted.

Remarks.

It is not neceſſary in actions of treſpaſs upon the caſe, or treſpaſs *vi et armis*, to lay the certain day in the declaration; but it may be laid any time after the cauſe of action accrued, and ſhould be laid before the writ iſſued.

If the cauſe of action ariſes within the term, it ſhould not be laid as of the term generally, but on a ſpecial day after the cauſe of action accrued, as on "Monday next after fifteen days from the day of Saint *Hilary*, in *Hilary* term, in the twenty-third year of the reign of king George the Third," inſtead of *Hilary* term generally. *Str.* 806.

Care muſt be taken to lay the damages at a ſufficient ſum, for the plaintiff cannot recover more damages than are laid in the declaration.

N. B.

N. B. Several of the following declarations are upon proceedings by original, a proceſs, which will be treated of hereafter; but it may be obſerved, by compariſon, that the declaration, when the action is brought by original, differs from that when it is brought by bill, ſolely in the commencement, and in omitting the pledges to proſecute at the end.

Declarations.

For work and labour done, and materials found and provided.

Hilary term, in the 23d year of the reign of king George the Third.

London, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas* the ſaid *Benjamin* on the firſt day of January, in the year of our lord one thouſand, ſeven hundred and eighty-three, at London aforeſaid, in the pariſh of St. Mary Le Bow, in the ward of Cheap, was indebted to the ſaid *William* in the ſum of fifty pounds of lawful money of Great Britain, for work and labour by the ſaid *William*, before that time done, performed, and beſtowed for the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt; *and alſo* for divers materials and neceſſary things uſed and applied in and about the ſaid work, before that time found and provided by the ſaid *William*, at the like inſtance of the ſaid *Benjamin*; and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed, the ſaid *William*, to pay to him the ſaid *William*, the ſaid ſum of fifty pounds when he the ſaid *Benjamin*, be thereto afterwards requeſted. *And whereas* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, had before that time done, performed,

formed, and beſtowed other work and labour for the ſaid *Benjamin*; and had alſo found and provided divers other materials and neceſſary things, uſed and employed in and about the ſaid work laſt mentioned, he the ſaid *Benjamin* undertook, and then and there faithfully promiſed the ſaid *William* to pay to him the ſaid *William* ſo much money as he the ſaid *William* therefore reaſonably deſerved to have; *And* the ſaid *William* avers, that he the ſaid *William* therefore reaſonably deſerved to have of the ſaid *Benjamin* other fifty pounds to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin*, then and there had notice. *And whereas* the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William*, in other fifty pounds for divers goods, wares, and merchandizes, by the ſaid *William*, before that time ſold and delivered to the ſaid *Benjamin* at his ſpecial inſtance and requeſt: *And* being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay to him, the ſaid *William* the ſaid ſum of fifty pounds laſt mentioned, when he, the ſaid *Benjamin*, ſhould be thereto afterwards requeſted. *And whereas* the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, had before that time ſold and delivered to the ſaid *Benjamin* divers other goods, wares and merchandizes, undertook and then and there faithfully promiſed the ſaid *William* to pay to him, the ſaid *William*, ſo much money as he, the ſaid *William*, therefore reaſonably deſerved to have; *And* the ſaid *William* avers, that he, the ſaid *William*, therefore deſerved to have of the ſaid *Benjamin*, other fifty pounds, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* then and there had notice. *And whereas alſo*, the

the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other fifty pounds of like lawful money of Great Britain, for money, by the ſaid *William* before that time laid out, expended, and paid for the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt; *And* being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London, aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Benjamin*, ſhould be thereto afterwards requeſted, yet the ſaid *Benjamin*, not regarding his aforeſaid ſeveral promiſes and undertakings ſo by him made in this behalf as aforeſaid, but contriving and fraudulently intending, craftily and ſubtilly, to deceive and defraud the ſaid *William* in this reſpect, hath not yet paid the ſaid ſeveral ſums of money before mentioned, or any part thereof to the ſaid *William*, although to do this the ſaid *Benjamin* was requeſted by the ſaid *William* afterwards, to wit, on the ſame day and year aforeſaid, and often afterwards, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, but to pay the ſame to the ſaid *William*, he, the ſaid *Benjamin*, hath hitherto wholly refuſed, and ſtill doth refuſe to the ſaid *William* his damage of one hundred pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff. *C. D.* for the defendant. (*Treſpaſs on the Caſe.*) } Pledges to proſecute { *John Doe*, and *Richard Roe.*

For work and labour, &c. as a ſurveyor.

Hilary term, in the twenty third year of the reign of king George the Third.

London, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, *for that whereas* the ſaid *Benjamin* on the firſt day,

of January, in the year of our Lord one thouſand ſeven hundred and eighty-three, at London aforeſaid, in the pariſh of St Mary le Bow, in the ward of Cheap, was indebted to the ſaid *William* in one hundred pounds of lawful money of Great Britain, for the work and labour, care and diligence, of the ſaid *William* by him before then done and performed, in and about the drawing of divers plans and elevations of dwelling houſes and buildings for the ſaid *Benjamin*, and at his requeſt, and in and about the ſurveying, ſuperintending, and taking care of a certain building, to wit, a dwelling houſe of him the ſaid *Benjamin* during the erection thereof, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, and for his the ſaid *William*'s attendance thereon, and his care in and about the ſame by him done, performed, and employed for the ſaid *Benjamin*, and at his requeſt; *and* being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and faithfully promiſed the ſaid *William* to pay to him the ſaid *William* the ſaid ſum of one hundred pounds when he the ſaid *Benjamin* ſhould be thereto afterwards requeſted; *and whereas* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, had done, performed, and beſtowed other his work and labour, care and diligence, in and and about the drawing divers other plans and elevations of dwelling houſes and other buildings for the ſaid *Benjamin* and in and about the ſurveying, ſuperintending, and taking care of a certain other building of him the ſaid *Benjamin*, to wit, a dwelling houſe, during the erection thereof, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, and had at his like requeſt attended thereon, and employed his the ſaid *William*'s care in and about the ſame, he the ſaid *Benjamin* then and there undertook, and faithfully promiſed the ſaid

William

William to pay him the ſaid *William* ſo much money as he therefore reaſonably deſerved to have; *and* the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* other one hundred pounds of like lawful money, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, there had notice; *and whereas* the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other one hundred pounds of like lawful money for the work and labour, care and diligence of the ſaid *William* by him the ſaid *William* before that time done, performed, and beſtowed, in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt; *and* being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and faithfully promiſed the ſaid *William* to pay him the ſaid laſt mentioned ſum of one hundred pounds, when he ſhould be thereto afterwards requeſted; *and whereas* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William* at the like ſpecial and requeſt of the ſaid *Benjamin* had before that time done, performed, and beſtowed, other his work and labour, care and diligence, in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and he the ſaid *Benjamin* then and there undertook, and faithfully promiſed the ſaid *William* to pay to him the ſaid *William* ſo much money as he therefore reaſonably deſerved to have; *and* the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* other one hundred pounds of like lawful money, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, there had notice; *and whereas* the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at Lon-

don aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other one hundred pounds of like lawful money for the work and labour, care and diligence, of the ſaid *William* by the ſaid *William* before that time done, performed, and beſtowed, in making divers journies, and giving his attendance in and about the buſineſs of the ſaid *Benjamin* and for the ſaid *Benjamin* and at his ſpecial inſtance and requeſt; *and* being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and faithfully promiſed the ſaid *William* to pay him the ſaid laſt mentioned ſum of one hundred pounds when he the ſaid *Benjamin* ſhould be thereto requeſted; *and whereas* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the ſaid *William* at the like ſpecial inſtance and requeſt of the ſaid *Benjamin* had before that time done, performed, and beſtowed, other his work and labour, care and diligence, in the performing divers other journies, and giving his other attendance in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin* he the ſaid *Benjamin* then and there undertook, and faithfully promiſed the ſaid *William* to pay him ſo much money as he therefore reaſonably deſerved to have; *and* the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* other one hundred pounds of like lawful money, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, there had notice; *and whereas* the ſaid *Benjamin* afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other one hundred pounds of like lawful money, for money by the ſaid *William* before that time paid, laid out and expended, for the ſaid *Benjamin* and at his ſpecial inſtance and requeſt; *and* being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day

day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and faithfully promiſed the ſaid *William*, to pay him, the ſaid *William*, the ſaid laſt mentioned ſum of one hundred pounds, when he ſhould be thereto afterwards requeſted; *yet* the ſaid *Benjamin* not regarding his aforeſaid ſeveral promiſes and undertakings, ſo by him made in this behalf as aforeſaid, but contriving, and fraudulently intending, craftily and ſubtilly, to deceive and defraud the ſaid *William* in this reſpect, hath not yet paid the ſaid ſeveral ſums of money, or any part thereof, to the ſaid *William*, although ſo to do the ſaid *Benjamin* was requeſted by the ſaid *William* afterwards, to wit, on the ſame day and year aforeſaid, and often afterwards, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, but he to do this hath hitherto wholly refuſed, and ſtill doth refuſe, to the ſaid *William* his damage of two hundred pounds, and therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. *(Treſpaſs on the Caſe.)* } Pledges to proſecute { *John Doe*, and *Richard Roe*.

For hire of horſes and chaiſes, and an Innkeeper's bill.

Eaſter Term, in the twenty third year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White* complains of *Benjamin Black*, gentleman, and *Bartholomew Brown*, gentleman, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, *for that whereas* the ſaid *Benjamin* and *Bartholomew*, on the firſt day of April, in the year of our Lord one thouſand ſeven hundred and eighty, at Taunton, in the county aforeſaid, were indebted to the ſaid *William* in the ſum of ſixty pounds, of lawful money of Great Britain, for the uſe and hire of divers poſt chaiſes, and divers horſes, mares, and geldings of the ſaid *William*, by the ſaid *William* to the ſaid *Benjamin* and *Bartholomew*, and at their ſpecial

cial inſtance and requeſt, before that time, let to hire, and by the ſaid *Benjamin* and *Bartholomew*, according to that letting to hire, had uſed and laboured in divers journeys, taken by the ſaid *Benjamin* and *Bartholomew* therewith, and for work and labour of the ſaid *William*, done and performed by the ſaid *William*, by himſelf and his ſervants, in driving and attending the ſaid *Benjamin* and *Bartholomew* in and about thoſe journeys, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin* and *Bartholomew*, and being ſo indebted, they the ſaid *Benjamin* and *Bartholomew*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid ſum of money, when they the ſaid *Benjamin* and *Bartholomew* ſhould be thereunto afterwards requeſted: *and whereas* alſo afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William* had before that time, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin* and *Bartholomew*, let to hire to the ſaid *Benjamin* and *Bartholomew*, divers other poſt chaiſes, and divers other horſes, mares, and geldings, of the ſaid *William*, and that they the ſaid *Benjamin* and *Bartholomew*, according to that letting to hire, had, had, uſed, and laboured the ſaid laſt mentioned poſt chaiſes, horſes, mares, and geldings, in divers other journeys, taken by the ſaid *Benjamin* and *Bartholomew* therewith, and that the ſaid *William* had, before that time, at the like inſtance and requeſt of the ſaid *Benjamin* and *Bartholomew*, done and performed other work and labour, by himſelf and his ſervants, for the ſaid *Benjamin* and *Bartholomew*, in driving and attending the ſaid *Benjamin* and *Bartholomew*, in and about the ſaid laſt mentioned journeys, they the ſaid *Benjamin* and *Bartholomew*, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him for the ſame, ſo much money, as he therefore reaſonably deſerved to have, when they the ſaid *Benjamin* and *Bartholomew*, ſhould be thereunto afterwards requeſted. *And* the

ſaid

ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* and *Bartholomew*, other ſixty pounds, of like lawful money, to wit, at Taunton aforeſaid, whereof the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, had notice. *And whereas* alſo, the ſaid *Benjamin* and *Bartholomew* afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, were indebted to the ſaid *William* in other ſixty pounds, of like lawful money, for ſo much money, before that time, paid, laid out and expended by the ſaid *William*, for the ſaid *Benjaman* and *Bartholomew*, and at their like ſpecial inſtance and requeſt, and being ſo indebted, they the ſaid *Benjamin* and *Bartholomew*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid laſt mentioned ſum of money, when they the ſaid *Benjamin* and *Bartholomew*, ſhould be thereunto afterwards requeſted. *And Whereas* alſo, afterwards to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, the ſaid *Benjamin* and *Bartholomew* were indebted to the ſaid *William*, in the further ſum of ſixty pounds, of like lawful money of Great Britain, for other work and labour, by the ſaid *William*, before that time done and performed for the ſaid *Benjamin* and *Bartholomew*, and at their like ſpecial inſtance and requeſt, and being ſo indebted, they the ſaid *Benjamin* and *Bartholomew*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay to him the ſaid ſum of money laſt mentioned, when they, the ſaid *Benjamin* and *Bartholomew* ſhould be thereunto afterwards requeſted: *and whereas* alſo, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William*, had before that time, at the like ſpecial inſtance

ſtance and requeſt of the ſaid *Benjamin* and *Bartholomew*, done and performed other work and labour, for the ſaid *Benjamin* and *Bartholomew*, they the ſaid *Benjamin* and *Bartholomew* undertook, and to the ſaid *William*, then and there faithfully promiſed to pay to him ſo much money as he, the ſaid *William*, for the ſaid laſt mentioned work and labour, reaſonably deſerved to have, and the ſaid *William* avers that he therefore reaſonably deſerved to have other ſixty pounds of like lawful money of Great Britain, to wit, at Taunton aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year aforeſaid, there had notice. *And whereas* alſo afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, the ſaid *Benjamin* and *Bartholomew* were indebted to the ſaid *William* in the further ſum of ſixty pounds, for divers goods, wares, and merchandizes of the ſaid *William*, by the ſaid *William*, before that time ſold and delivered to the ſaid *Benjamin* and *Bartholomew*, and at their like ſpecial inſtance and requeſt; and being ſo indebted, they the ſaid *Benjamin* and *Bartholomew* in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay him the ſaid laſt mentioned ſum of money whenever afterwards they the ſaid *Benjamin* and *Bartholomew* ſhould be thereunto requeſted. *And whereas alſo*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, the ſaid *Benjamin* and *Bartholomew*, in conſideration that the ſaid *William*, at the like ſpecial ſpecial inſtance and requeſt of the ſaid *Benjamin* and *Bartholomew*, had before that time ſold and delivered divers other goods, wares, and merchandizes to the ſaid *Benjamin* and *Bartholomew*, they the ſaid *Benjamin* and *Bartholomew* undertook, and to the ſaid *William* then and there faithfully promiſed to pay him ſo much money as he therefore reaſonably deſerved to have. *And* the ſaid *William* avers, that he therefore reaſonably deſerved to have

of the ſaid *Benjamin* and *Bartholomew* other ſixty pounds of like lawful money, to wit, at Taunton aforeſaid, whereof the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year aforeſaid, there had notice. *And whereas* the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, were indebted to the ſaid *William* in other ſixty pounds, for meat, drink, punch, wine, ale, tobacco, and other neceſſaries, by the ſaid *William* before then found and provided for the ſaid *Benjamin* and *Bartholomew*, and divers other perſons, at the like requeſt of the ſaid *Benjamin* and *Bartholomew*; and being ſo indebted, they the ſaid *Benjamin* and *Bartholomew*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay him the ſaid ſum of money, laſt mentioned, when they ſhould be thereto afterwards requeſted. *And whereas* afterwards, to wit, on the ſame day and year aforeſaid, in conſideration that the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin* and *Bartholomew* had before then found and provided other meat, drink, punch, wine, ale, tobacco, and other neceſſaries for the ſaid *Benjamin* and *Bartholomew*, and divers other perſons they the ſaid *Benjamin* and *Bartholomew* undertook, and then and there faithfully promiſed the ſaid *William* to pay him for the ſame ſo much money as he therefore reaſonably deſerved to have. *And* the ſaid *William* avers, that he therefore reaſonable deſerved to have of the ſaid *Benjamin* and *Bartholomew* other ſixty pounds, to wit, at Taunton aforeſaid, whereof the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Taunton aforeſaid had notice. *And whereas* alſo the ſaid *Benjamin* and *Bartholomew*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, accounted with the ſaid *William*, of and concerning divers ſums of money before that time due

and owing from the ſaid *Benjamin* and *Bartholomew* to the ſaid *William*, and then being in arrear and unpaid; and upon that account the ſaid *Benjamin* and *Bartholomew* were then and there found in arrear, and indebted to the ſaid *William* in the ſum of other ſixty pounds; and being ſo found in arrear and indebted, they the ſaid *Benjamin* and *Bartholomew* in conſideration thereof afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay to him the ſaid laſt mentioned ſum of money, whenever they the ſaid *Benjamin* and *Bartholomew* ſhould be thereunto afterwards requeſted. *Neverthelefs* the ſaid *Benjamin* and *Bartholomew*, their ſaid ſeveral promiſes and undertakings, in manner and form aforeſaid made, in no ways regarding, but contriving and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William* in this behalf, have not paid to him the ſaid *William* the ſaid ſeveral ſums of money, or any or either of them, or any part thereof altho' often requeſted by the ſaid *William* ſo to do but to pay the ſame to the ſaid *William*; they the ſaid *Benjamin* and *Bartholomew*, have hitherto wholly refuſed, and ſtill do refuſe, to the damage of the ſaid *William* of one hundred pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

For the uſe and occupation of land.

Trinity term, in the twenty third year of the reign of king George the third.

Somerſetſhire, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king

king himſelf, *for that whereas* the ſaid *Benjamin*, on the firſt day of April, in the year of our Lord one thouſand ſeven hundred and eighty three, at Taunton, in the county aforeſaid, was indebted to the ſaid *William*, in the ſum of ſixty pounds, of lawful money of Great Britain, for the uſe and occupation of divers, to wit, forty acres of meadow, forty acres of paſture, forty acres of orchard, and forty acres of land, with the appurtenances, of the ſaid *William*, ſituate, lying, and being in the pariſh of Clevedon, in the county aforeſaid, by the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, by the permiſſion of the ſaid *William*, for a long time before that time had held, uſed, occupied, poſſeſſed, and enjoyed. And being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed to pay to him, the ſaid ſum of money, when he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted. *And whereas* alſo, afterwards to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William* had before that time, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, permitted the ſaid *Benjamin* to hold, uſe, occupy, poſſeſs, and enjoy divers, to wit, forty acres of other meadow, forty acres of other paſture, forty acres of other orchard, and forty acres of other land, with the appurtenances, of the ſaid *William*, ſituate, lying, and being in the pariſh of Clevedon, aforeſaid, in the county aforeſaid, and that the ſaid *Benjamin*, by virtue of the ſaid laſt mentioned permiſſion of the ſaid *William*, had, held, uſed, occupied, poſſeſſed, and enjoyed the ſaid laſt mentioned lands, with their appurtenances for a long time before that time: he the ſaid *Benjamin*, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay to him, ſo much money as he therefore reaſonably deſerved to have, when he the ſaid *Benjamin* ſhould be thereunto after-

wards requeſted: *And* the ſaid *William* doth aver, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* other ſixty pounds of like lawful money, to wit, at Taunton aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, there had notice. *Nevertheleſs* the ſaid *Benjamin*, not regarding his ſaid ſeveral promiſes and undertaking, in manner and form aforeſaid made, but contriving and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William* in this behalf, has not yet paid to him the ſaid ſeveral ſums of money, or either of them, or any part thereof, although often requeſted ſo to do but to pay the ſame to the ſaid *William*, he the ſaid *Benjamin* hath hitherto wholly refuſed, and ſtill doth refuſe, to the damage of the ſaid *William* of one hundred pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff,
C. D. for the defendant.
(Treſpaſs on the Caſe.)

Pledges to proſecute { *John Doe*, and *Richard Roe.*

On a promiſſory note by the drawee againſt the drawer.

Hilary term, in the twenty-third year of the reign of king George the Third.

London, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our lord the king, before the king himſelf. for that *whereas* the ſaid *Benjamin*, on the firſt day of December, in the year of our lord one thouſand, ſeven hundred and eighty-two, at London, aforeſaid, in the pariſh of Saint Mary le Bow, in the ward of Cheap, made his certain note in writing, commonly called a promiſſory note, his own proper hand and name being thereunto ſubſcribed, bearing date the ſame day and year, and then and there delivered the ſaid note to the ſaid *William*, by which ſaid note the ſaid *Benjamin* promiſed to pay to the ſaid *William*, by the name and deſcription

tion of *William White*, eſquire, or to his order, the ſum of twenty-five pounds for value received by him the ſaid *Benjamin*, *by* reaſon whereof, and by force of the ſtatute, in ſuch caſe made and provided, the ſaid *Benjamin* became liable to pay to the ſaid *William* the ſaid ſum of twenty-five pounds, in the ſaid note mentioned, according to the tenor and effect of the ſaid note; *And* being ſo liable, he the ſaid *William*, in conſideration thereof, afterwards, to wit, the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, undertook and faithfully promiſed the ſaid *William* to pay to him the ſaid *William* the ſaid ſum of twenty-five pounds, in the ſaid note mentioned, according to the tenor and effect of the ſaid note *And whereas* the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted unto the ſaid *William* in other twenty-five pounds of like lawful money for ſo much money by the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, before that time lent and advanced to the ſaid *Benjamin*. *And* being ſo indebted, the ſaid *Benjamin*, afterwards to wit, the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration thereof, then and there undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin* would well and truly pay to the ſaid *William* the ſaid ſum of twenty-five pounds, laſt mentioned, whenever afterwards he the ſaid *Benjamin* ſhould be thereto requeſted; *And whereas* the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at London, aforeſaid, in the pariſh and ward aforeſaid, was indebted unto the ſaid *William*, in another ſum of twenty-five pounds of like lawful money of Great Britain, for the like ſum by the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, before that time paid, laid out, and expended for the ſaid *Benjamin*, to and for his uſe and behoof; *And* being ſo indebted, he, the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration thereof, then and there undertook,

and

and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin* would well and truly pay to the ſaid *William* the ſaid ſum of twenty-five pounds, laſt mentioned, whenever after he the ſaid *Benjamin* ſhould be thereto requeſted; *nevertheleſs* the ſaid *Benjrmin*, in no wiſe regarding his ſaid ſeveral promiſes and undertakings, in form aforeſaid made, but contriving, and fraudulently intending, craftily and ſubtlely, to deceive and defraud the ſaid *William*, of the ſaid ſeveral ſums of money, the ſame, or any part thereof to the ſaid *William*, hath not paid nor in any wiſe ſatisfied him for the ſame, although the ſaid *Benjamin*, afterwards, to wit, on the fourth day of January, in the year of our lord one thouſand, ſeven hundred and eighty three, and often times afterwards, at London aforeſaid, in the pariſh and ward aforeſaid, was, by the ſaid *William* requeſted to pay the ſame; but the ſame to the ſaid *William* hitherto he the ſaid *Benjamin* hath, and ſtill doth refuſe to pay, to the damage of the ſaid *William* of fifty pounds, And therefore he brings ſuit, &c.

A. B. for the plaintiff.
C. D. for the defendant.
} Pledges to proſecute { *John Doe*, and *Richard Roe*,

(Treſpaſs on the Caſe.)

On a promiſſory note, by the indorſee again the drawer.

Hilary term, in the twenty third year of the reign of king George the third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the firſt day of December, in the year of our Lord one thouſand ſeven hundred and eighty two, at Weſtminſter, in the county aforeſaid, made his certain note in writing, commonly called a promiſſory note, with his own proper hand and name thereto ſubſcribed, bearing date the ſame day and year, and by the ſaid note

promiſed

promiſed to pay to one *Richard Red*, by the name and deſcription of *Richard Red*, Eſquire, or to his order, one month after the date of the ſaid note, the ſum of twenty-five pounds, for value received of him the ſaid *Richard Red*; *And* afterwards the ſaid *Richard Red*, to whom, or to whoſe order, the payment of the ſaid ſum of twenty-five pounds, in the aforeſaid note mentioned, was to be made, before the payment of the aforeſaid money, or of any parcel thereof, and alſo before the time appointed by the ſaid note, for the payment thereof, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, by his indorſement on the ſaid note, ſubſcribed with the proper hand and name of him the ſaid *Richard*, ordered and appointed the contents of the ſaid note to be paid to the ſaid *William*, or his order, for value received, and then and there delivered the ſaid note, ſo indorſed, to the ſaid *William*, of which ſaid indorſement, ſo made upon the ſaid note, as aforeſaid, the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, had notice, by reaſon of which premiſes, and alſo by force of the ſtatute in ſuch caſe made and provided, the ſaid *Benjamin* became liable to pay the ſaid *William* the ſaid ſum of twenty-five pounds, in the ſaid note mentioned, according to the tenor and effect of the ſaid note, and the ſaid indorſement ſo thereon, made as aforeſaid; and the ſaid *Benjamin* being ſo liable, afterwards, to wit, the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, in conſideration thereof undertook himſelf, and to the ſaid *Wi liam* then and there faithfully promiſed, that he the ſaid *Benjamin* would well and truly pay to the ſaid *William* the ſaid ſum of twenty-five pounds, according to the tenor and effect of the ſaid note, and the ſaid indorſement ſo thereon made, as aforeſaid: *And whereas* the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at Weſtminſter aforeſid, in the county aforeſaid, was indebted unto the ſaid *William* in other twenty-five pounds of like lawful money of Great Britain, for the like ſum of money by the ſaid *William*, at the ſpecial inſtance

ſtance and requeſt of the ſaid *Benjamin*, before that time lent and advanced to the ſaid *Benjamin*, and being ſo indebted, the ſaid *Benjamin*, afterwards, to wit, the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed to pay to him, the ſaid *William*, the ſaid laſt mentioned ſum of twenty-five pounds, whenever he the ſaid *Benjamin* ſhould be afterwards required; *And whereas* the ſaid *Benjamin* afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, was indebted unto the ſaid *William*, in other twenty-five pounds, of like lawful money, for the like ſum of money by the ſaid *William* before that time, at the like inſtance and requeſt of the ſaid *Benjamin* and to and for his uſe, paid, laid out, and expended: *And* being ſo indebted, the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed to pay to him the ſaid *William*, the ſaid ſum of twenty-five pounds laſt mentioned, whenever he the ſaid *Benjamin* ſhould be thereunto requeſted; *Nevertheleſs* the ſaid *Benjamin* in no wiſe regarding his ſeveral promiſes and undertakings aforeſaid, in form aforeſaid made, but contriving, and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William* in this behalf, hath not paid him the ſaid *William* the ſaid ſeveral ſums of money, or any part thereof, nor in any wiſe contented him for the ſame, although the ſaid *Benjamin* was requeſted ſo to do by the ſaid *William*, afterwards, to wit, the ſame day and year, and often afterwards, at Weſtminſter aforeſaid, in the county aforeſaid, but the ſaid *Benjamin* hath hitherto wholly refuſed, and ſtill doth refuſe, to pay the ſame to the ſaid *William* to his damage of fifty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff.
C. D. for the defendant.
} Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

On a joint note againſt one drawer.

Michaelmas term, in the twenty-firſt year of the reign of king George the Third.

Middleſex, to wit. } *Robert Day* complains of *Charles Tate*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas*, the ſaid *Charles Tate*, together with one *Job Jacks*, one *Nicholas Norris*, and one *Peter Perry*, on the twenty-firſt day of March, in the year of our lord one thouſand ſeven hundred and eighty-three, at Weſtminſter in the county aforeſaid, made his certain note in writing, commonly called a promiſſory note, his own proper hand being thereunto ſubſcribed, bearing date the ſame day and year aforeſaid, and then and there delivered the ſaid note to the ſaid *Robert Day*, and thereby two months after the date thereof, jointly and ſeparately promiſed to pay unto the ſaid *Robert Day*, by the name and deſcription of Mr. *Robert Day*, or order, the ſum of eighteen pounds for value received, by reaſon whereof, and alſo by force of the ſtatute in ſuch caſe made and provided, the ſaid *Charles Tate* became liable to pay unto the ſaid *Robert Day*, the ſaid ſum of money in the ſaid note contained, according to the tenor and effect of the ſaid note, and being ſo liable, he the ſaid *Charles Tate* in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *Robert Day*, then and there faithfully promiſed to pay unto him the ſaid ſum of money, in the ſaid note mentioned, according to the tenor and effect of the ſaid note. *And whereas* alſo, afterwards, to wit, on the twenty-fifth day of May, in the year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Charles Tate*, was indebted to the ſaid *Robert Day*, in the ſum of twenty pounds of lawful money of Great Britain, for ſo much money by the ſaid *Robert Day*, before that time, lent and advanced to the ſaid *Charles Tate*, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Charles Tate*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt, aforeſaid, at

Weſtminſter aforeſaid, in the county aforeſaid, took upon himſelf, and then and there faithfully promiſed the ſaid *Robert Day*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Charles Tate* ſhould be thereunto, afterwards, requeſted. *And whereas* alſo, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Charles Tate*, was indebted to the ſaid *Robert Day*, in the further ſum of twenty pounds, of like lawful money, for ſo much money by the ſaid *Robert Day*, before that time paid, laid out, and expended, for the ſaid *Charles Tate*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Charles Tate*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Robert Day*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Charles Tate*, ſhould be thereunto, afterwards, requeſted; *nevertheleſs*, the ſaid *Charles Tate*, not regarding his ſaid ſeveral promiſes and undertakings, in manner and form aforeſaid made, but contriving and fraudulently intending, craftily, and ſubtlely to deceive and defraud the ſaid *Robert Day*, in this behalf, hath not yet paid to him the ſaid ſeveral ſums of money, or any of them, or any part thereof, although ſo to do, he the ſaid *Charles Tate*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, by the ſaid *Robert Day*, was requeſted, but to pay the ſame or any part thereof, to the ſaid *Robert Day*, he the ſaid *Charles Tate*, hath hitherto, wholly refuſed, and ſtill refuſe, to the damage of the ſaid *Robert Day*, of twenty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſeute, { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

Hilary

On a bill of exchange, the drawee againſt the acceptor.

Hilary term, in the twenty-third year of the reign of king George the Third.

By original.

Middleſex, to wit. } *Benjamin Black*, late of Brompton, in the ſaid county, gent. was attached to anſwer *William White*, in a plea of treſpaſs upon the caſe, and whereupon the ſaid *William White*, by *A. B.* his attorney, complains, that *whereas*, at the ſeveral times hereafter mentioned, the ſaid *Benjamin Black*, *William White*, and one *George Gray*, were perſons reſiding, trading, and uſing commerce within this kingdom of England, to wit, at Weſtminſter, in the county aforeſaid, and being ſo reſiding, trading, and uſing commerce reſpectively, he the ſaid *George Gray*, on the thirtieth day of April, in the year of our lord, one thouſand ſeven hundred and eighty-three, at Weſtminſter aforeſaid, in the county aforeſaid, made his certain bill of exchange in writing, ſubſcribed with his own proper hand, according to the cuſtom of merchants, for time immemorial, uſed and approved of, and the ſaid bill bearing date, the ſame day and year aforeſaid, then and there directed, the ſaid bill to the ſaid *Benjamin Black*, by the name and deſcription of Mr. *Black*, number ninety-nine, Brompton-row, Knightſbridge, and thereby required him the ſaid *Benjamin*, on the fifteenth day of Auguſt then next, to pay to the ſaid *William*, by the name and deſcription of Mr. *White*, or his order, thirty-one pounds, eleven ſhillings and ſix-pence, for value received, which ſaid bill of exchange, he the ſaid *Benjamin*, afterwards, and before the time appointed, by the ſaid bill, for the payment of the ſaid ſum of money, in the ſaid bill mentioned, to wit, on the ſame day and year aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, upon ſight thereof accepted, according to the ſaid cuſtom, and by reaſon thereof, and according to the ſaid cuſtom of merchants, the ſaid *Benjamin* became liable to pay unto the ſaid *William*, the ſaid ſum of money mentioned in the bill of exchange, according to the tenor and effect, of the ſaid bill of exchange,

Weſtminſter aforeſaid, in the county aforeſaid, took upon himſelf, and then and there faithfully promiſed the ſaid *Robert Day*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Charles Tate* ſhould be thereunto, afterwards, requeſted. *And whereas* alſo, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Charles Tate*, was indebted to the ſaid *Robert Day*, in the further ſum of twenty pounds, of like lawful money, for ſo much money by the ſaid *Robert Day*, before that time paid, laid out, and expended, for the ſaid *Charles Tate*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Charles Tate*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Robert Day*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Charles Tate*, ſhould be thereunto, afterwards, requeſted; *nevertheleſs*, the ſaid *Charles Tate*, not regarding his ſaid ſeveral promiſes and undertakings, in manner and form aforeſaid made, but contriving and fraudulently intending, craftily, and ſubtlely to deceive and defraud the ſaid *Robert Day*, in this behalf, hath not yet paid to him the ſaid ſeveral ſums of money, or any of them, or any part thereof, although ſo to do, he the ſaid *Charles Tate*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, by the ſaid *Robert Day*, was requeſted, but to pay the ſame or any part thereof, to the ſaid *Robert Day*, he the ſaid *Charles Tate*, hath hitherto, wholly refuſed, and ſtill refuſe, to the damage of the ſaid *Robert Day*, of twenty pounds. And therefore he brings ſuit, &c.

A, B. for the plaintiff,
C. D. for the defendant. } Pledges to proſecute, { *John Doe*, and *Richard Roe.*

(Treſpaſs on the Caſe.)

Hilary

On a bill of exchange, the drawee againſt the acceptor.

Hilary term, in the twenty-third year of the reign of king George the Third.

By original.

Middleſex, to wit. } *Benjamin Black*, late of Brompton, in the ſaid county, gent. was attached to anſwer *William White*, in a plea of treſpaſs upon the caſe, and whereupon the ſaid *William White*, by *A. B.* his attorney, complains, that *whereas*, at the ſeveral times hereafter mentioned, the ſaid *Benjamin Black*, *William White*, and one *George Gray*, were perſons reſiding, trading, and uſing commerce within this kingdom of England, to wit, at Weſtminſter, in the county aforeſaid, and being ſo reſiding, trading, and uſing commerce reſpectively, he the ſaid *George Gray*, on the thirtieth day of April, in the year of our lord, one thouſand ſeven hundred and eighty-three, at Weſtminſter aforeſaid, in the county aforeſaid, made his certain bill of exchange in writing, ſubſcribed with his own proper hand, according to the cuſtom of merchants, for time immemorial, uſed and approved of, and the ſaid bill bearing date, the ſame day and year aforeſaid, then and there directed, the ſaid bill to the ſaid *Benjamin Black*, by the name and deſcription of Mr. *Black*, number ninety-nine, Brompton-row, Knightſbridge, and thereby required him the ſaid *Benjamin*, on the fifteenth day of Auguſt then next, to pay to the ſaid *William*, by the name and deſcription of Mr. *White*, or his order, thirty-one pounds, eleven ſhillings and ſix-pence, for value received, which ſaid bill of exchange, he the ſaid *Benjamin*, afterwards, and before the time appointed, by the ſaid bill, for the payment of the ſaid ſum of money, in the ſaid bill mentioned, to wit, on the ſame day and year aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, upon ſight thereof accepted, according to the ſaid cuſtom, and by reaſon thereof, and according to the ſaid cuſtom of merchants, the ſaid *Benjamin* became liable to pay unto the ſaid *William*, the ſaid ſum of money mentioned in the bill of exchange, according to the tenor and effect, of the ſaid bill of exchange,

and of his ſaid acceptance thereof, and being ſo liable, he the ſaid *Benjamin*, in conſideration thereof afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter, aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid ſum of money, contained in the ſaid bill, according to the tenor and effect of the ſaid bill of exchange, and of his ſaid acceptance thereof, as aforeſaid. *And whereas*, the ſaid *Benjamin*, afterwards, to wit, on the eighteenth day of Auguſt, in the year aforeſaid, at Weſtminſter, aforeſaid, was indebted unto the ſaid *William*, in the ſum of forty pounds, of lawful money of Great Britain, for ſo much money by the ſaid *William*, before that time, lent and advanced, to the ſaid *Benjamin*, at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, took upon himſelf, and to the ſaid *William*, then and there, faithfully promiſed to pay unto him the ſaid ſum of forty pounds, whenever, afterwards, he the ſaid *Benjamin* ſhould be thereunto requeſted. *And whereas*, alſo afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, the ſaid *Benjamin* was indebted unto the ſaid *William*, in the further ſum of forty pounds, of like lawful money of Great Britain, for ſo much money by the ſaid *Benjamin*, before that time, had and received, to and for the uſe of the ſaid *William*, and being ſo indebted, he the ſaid *Benjamin*, in conſequence thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, took upon himſelf, and to the ſaid *William*, then and there faithfully promiſed to pay unto him the ſaid ſum of forty pounds, laſt mentioned, whenever, afterwards, he the ſaid *Benjamin*, ſhould be thereunto requeſted; yet the ſaid *Benjamin*, not regarding his ſaid ſeveral promiſes and undertakings, by him in form aforeſaid made, but contriving and fraudulently, intending, craftily, and ſubtlely to deceive and defraud the ſaid *William* in this reſpect,

reſpect, hath not yet paid the ſaid ſeveral ſums of money or either of them, or either of them, or any part thereof, to the ſaid *William*, or in any wiſe ſatisfied him for the ſame, although to do this, the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, was requeſted; but he to pay the ſame to the ſaid *William*, hath hitherto altogether refuſed, and ſtill doth refuſe, to the damage of the ſaid *William* of forty pounds. And therefore he brings ſuit, &c.

(Treſpaſs on the Caſe.)

On a bill of exchange, by the indorſee againſt the drawer.

Hilary term, in the twenty-third year of the reign of king George the Third.

London, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the firſt day of December, in the year of our Lord one thouſand ſeven hundred and eighty-two, at London, aforeſaid, to wit, in the pariſh of St. Mary le Bow, in the ward of Cheap, according to the uſage and cuſtom of merchants, made his certain bill of exchange in writing, ſubſcribed with his own hand, bearing date the ſame day and year aforeſaid, and directed the ſaid bill of exchange to one *Bartholomew Brown*, by the name and deſcription of Mr. *Bartholomew Brown*, of Lombard ſtreet, London, by which ſaid bill of exchange the ſaid *Benjamin* required the ſaid *Bartholomew*, one month after date, to pay to one *Richard Red*, by the name of Mr. *Richard Red*, or order, fifty pounds, value received, and place the ſame to the account of the ſaid *Benjamin Black*, which ſaid bill of exchange, afterwards, the ſame day and year laſt above mentioned, at London aforeſaid, to wit, in the pariſh and ward aforeſaid, the ſaid *Bartholomew*

lomew accepted, according to the uſage and cuſtom of merchants, to pay to the ſaid *Richard*, or his order, the ſaid ſum of fifty pounds, in the ſaid bill of exchange mentioned, according to the tenor and effect of the ſame bill, and the ſaid *Richard*, to whom, or to whoſe order the ſaid ſum of money contained in the ſaid bill was to be paid, afterwards, and before the time for the payment of the ſaid ſum of money mentioned in the ſaid bill, to wit, on the ſame day and year above mentioned, at London aforeſaid, in the pariſh and ward aforeſaid, indorſed the ſaid bill with his own proper hand thereto ſubſcribed, according to the uſage and cuſtom of merchants, and by the ſaid indorſement ordered the contents of the ſame bill to be paid to the ſaid *William*, or his order, for value received, of which ſaid indorſement ſo made upon the ſaid bill, the ſaid *Benjamin*, the ſame day and year above mentioned had notice, and the ſaid *William*, in fact ſaids, that afterwards, to wit, on the fourth day of January, in the year of our Lord, one thouſand ſeven hundred and eighty-three, at London aforeſaid, in the pariſh and ward aforeſaid, he the ſaid *William* ſhewed the ſaid *Bartholomew* the ſaid bill, with the ſaid indorſement thereon, and then and there required him, the ſaid *Bartholomew*, to pay the ſaid bill, which the ſaid *Bartholomew*, then and there refuſed to do, of which premiſes the ſaid *Benjamin*, afterwards, to wit, on the ſame fourth day of January, in the year laſt aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, had notice, by reaſon of which premiſes, he the ſaid *Benjamin*, according to the uſage and cuſtom of merchants, became, and is chargeable and liable to pay the ſaid *William*, the ſaid ſum of fifty pounds, mentioned in the ſaid bill of exchange; and the ſaid *Benjamin* being ſo chargeable and liable as aforeſaid, afterwards, to wit, the ſame day and year laſt above mentioned, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration thereof undertook, and to the ſaid *William*, then and there faithfully promiſed, that he the ſaid *Benjamin*, would well and truly content and pay to the ſaid *William*, the ſaid ſum of fifty pounds,

according

according to the tenor and effect of the ſaid bill; *And whereas* the ſaid *Benjamin*, afterwards, to wit, the ſame day and year laſt aforeſaid, at London, aforeſaid, in the pariſh and ward aforeſaid, was indebted unto the ſaid *William* in another ſum of fifty pounds of like lawful money of Great Britain, for the like ſum by the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, before that time paid, laid out, and expended for the ſaid *Benjamin*, to and for his uſe and behoof; *And* being ſo indebted, he, the ſaid *Benjamin*, afterwards, to wit, the ſame day and year laſt aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration thereof, then and there undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin* would well and truly pay to the ſaid *William* the ſaid ſum of fifty pounds, laſt mentioned, whenever after he the ſaid *Benjamin* ſhould be thereto requeſted; *And whereas* the ſaid *William*, on the ſame day and year laſt above mentioned, at London aforeſaid, to wit, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in another ſum of fifty pounds of like lawful money for ſo much money by the ſaid *Benjamin*, for the ſaid *William*, and for the uſe of the ſaid *William*, before that time had and received; *And* being ſo indebted, the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, the ſame day and year laſt above mentioned, at London, aforeſaid, in the pariſh and ward aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin*, the ſaid fifty pounds laſt mentioned, to the ſaid *William*, when he the ſaid *Benjamin* ſhould be thereto required, would likewiſe well and truly pay and content; *nevertheleſs* the ſaid *Benjamin*, not regarding his aforeſaid ſeveral promiſes and undertakings made in manner aforeſaid, but contriving and fraudulently intending, him the ſaid *William* in this behalf, craftily and ſubtlely, to deceive and defraud the aforeſaid ſeveral ſums of money, or any part thereof to the ſaid *William* hath not paid, or otherwiſe contented him for the ſame, although the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year

laſt

laſt above mentioned, and often afterwards, at London aforeſaid, in the pariſh and ward aforeſaid, by the ſaid *William* hath been requeſted ſo to do; but the ſaid *Benjamin*, hath hitherto altogether refuſed to pay the ſame to the ſaid *William*, or otherwiſe content him for the ſame, and ſtill refuſes to pay the ſame, to the damage of the ſaid *William* of one hundred pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe.*

(Treſpaſs on the Caſe.)

On a bill of exchange, the indorſee againſt the acceptor. Hilary term, in the twenty-third year of the reign of king George the Third.

By original.

London, to wit. } *Benjamin Black*, late of London, gentleman, was attached to anſwer to *William White*, in a plea of treſpaſs on the caſe; *And* thereupon the ſaid *William*, by *A. B.* his attorney, complains, that *whereas* one *Bartholomew Brown*, on the firſt day of December, in the year of our Lord one thouſand, ſeven hundred and eighty-two, at London aforeſaid, to wit, in the pariſh of Saint Mary le Bow, in the ward of Cheap, made his certain bill of exchange in writing, ſubſcribed with his own proper hand, according to the uſage and cuſtom of merchants, the ſaid bill bearing date the ſame day and year, and then and there directed the ſaid bill to the ſaid *Benjamin*; by the name and deſcription of Mr. *Benjamin Black*, of Lombard-ſtreet, London; and by the ſaid bill required him the ſaid *Benjamin*, one month after the date thereof, to pay to him the ſaid *Bartholomew*, or his order, fifty pounds for value received, and place the ſame to the account of him the ſaid *Bartholomew*; which ſaid bill, afterwards, to wit, on the ſame day and year aforeſaid, at London, aforeſaid, in the pariſh and ward aforeſaid, was ſhewn and preſented to the ſaid *Benjamin* for his acceptance thereof, and the ſaid *Benjamin* then and there, according

cording to the cuſtom of merchants, accepted the ſaid bill of exchange, and the ſaid ſum of money in the ſaid bill of exchange being wholly unpaid, he the ſaid *Bartholomew*, afterwards, and before the time limitted for payment thereof, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, indorſed the ſaid bill with his own proper hand thereunto ſubſcribed, and by that indorſement appointed the contents of the ſaid bill to be paid to the ſaid *William* for value received, and then and there delivered the ſaid bill to the ſaid *William*, ſo indorſed as aforeſaid, of which ſaid premiſes the ſaid *Benjamin*, afterwards to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, had notice, and by reaſon of the premiſes, and by force of the cuſtom of merchants, the ſaid *Benjamin* became liable to pay to the ſaid *William* the ſaid ſum of money mentioned in the ſaid bill, according to the ſaid tenor and effect of the ſaid bill, and his acceptance thereof as aforeſaid; and being ſo liable, the ſaid *Benjamin*, in conſideration thereof, afterwards to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed to pay him the ſaid ſum of money mentioned in the ſaid bill, according to the tenor and effect of the ſaid bill, and of his acceptance thereof as aforeſaid: *And whereas* alſo the ſaid *Benjamin*, afterwards to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other fifty pounds of lawful money of Great Britain, for ſo much money by the ſaid *William* to and for the uſe of the ſaid *Benjamin*, at his ſpecial inſtance and requeſt, before that time paid, laid out, and expended; and being ſo indebted the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin* would pay to the ſaid *William* the ſaid ſum of fifty pounds laſt

mentioned, when thereunto afterwards he ſhould be requeſted: *And whereas* alſo the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *William* in other fifty pounds of like lawful money of Great Britain, for ſo much money by the ſaid *Benjamin*, before that time had and received to the uſe of the ſaid *William*, and being ſo indebted, the ſaid *Benjamin*, in conſideration thereof, afterwards, that is to ſay, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, that he the ſaid *Benjamin*, would well and truly pay the ſaid fifty pounds, laſt mentioned, to the ſaid *William*, when he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted; *nevertheleſs* the ſaid *Benjamin*, not regarding his ſaid ſeveral promiſes and undertakings, ſo made in form aforeſaid, but contriving, and fraudulently intending to deceive and defraud the ſaid *William* in this behalf, hath not paid to him the ſaid ſeveral ſums of money, or any of them, or any part thereof, although ſo to do the ſaid *Benjamin*, afterwards, to wit, on the fourth day of January, in the year of our Lord one thouſand ſeven hundred and eighty-three, at London aforeſaid, in the pariſh and ward aforeſaid, was requeſted by the ſaid *William* ſo to do; but the ſaid *Benjamin* to pay the ſame to him the ſaid *William*, hath hitherto refuſed, and ſtill refuſes, to the damage of the ſaid *William* of one hundred pounds. And therefore he brings ſuit, &c.

[Preſs as on the Caſe.]

On Bond.

Hilary term, in the twenty-ſecond year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White*, complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our ſovereign lord the king, before the king himſelf, of a plea that he

he render to him forty pounds of lawful money of Great Britain, which he owes to, and unjuſtly detains from him, &c. for that *whereas*, the ſaid *Benjamin*, on the ſeventh day of May, in the year of our Lord, one thouſand ſeven hundred and eighty-three, at Dulverton, in the county aforeſaid, by his certain writing, obligatory ſealed, with the ſeal of the ſaid *Benjamin*, and to the court of the ſaid lord the king, now here ſhewn, the date whereof is the ſame day and year aboveſaid, did acknowledge himſelf to be held and firmly bound to the ſaid *William*, in the aforeſaid ſum of forty pounds, to be paid to the ſaid *William*, whenever he the ſaid *Benjamin*, ſhould be thereto required. *Nevertheleſs*, the ſaid *Benjamin* (although often required) the ſaid forty pounds, or any part thereof, to the ſaid *William*, hath not paid, but the ſame to him to pay, hath hitherto wholly refuſed, and ſtill doth refuſe, to the damage of the ſaid *William*, of twenty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Debt.)

Trover.

Trinity term, in the twenty-third year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our ſovereign lord the king, before the king himſelf, for that, *whereas* the ſaid *William White*, on the firſt day of June in the year of our lord one thouſand ſeven hundred and eighty-three, at Taunton, in the county aforeſaid, was poſſeſſed of the goods and chattels following, to wit, one waggon, ten wheels, five ladders, of the value of ten pounds, as of his own proper goods and chattels, and being ſo poſſeſſed thereof, he the ſaid *William White*, afterwards,

wards, to wit, on the ſame day and year aforeſaid, at Taunton, aforeſaid, in the county aforeſaid, caſually loſt the ſaid goods and chattels out of his hands, and poſſeſſion, which ſaid goods and chattels, afterwards, to wit, on the twentieth day of February, in the year of our Lord one thouſand ſeven hundred and eighty-three, at Taunton, aforeſaid, in the county aforeſaid, came into the hands of the ſaid *Benjamin Black*, by finding yet the ſaid *Benjamin Black*, well knowing the ſaid goods and chattels to be the proper goods and chattels of the ſaid *William White*, and of right to belong, and appertain unto him, but contriving, and fraudulently intending, craftily, and ſubtlely to deceive and defraud the ſaid *William White*, in this reſpect, did not (although often requeſted) deliver the ſaid goods and chattels, to the ſaid *William White*, but wholly refuſed ſo to do, and afterwards, to wit, on the ſame day and year laſt aforeſaid, at Taunton, aforeſaid, in the county aforeſaid, converted and diſpoſed of the ſaid goods and chattels to his own uſe, to the damage of the ſaid *William White*, of thirty pounds. And thereupon he brings ſuit, &c.

A. B. for the plaintiff. *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe.*

(Trover.)

Warranty.

Eaſter term, in the twenty-third year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the now kin , before he k g himſelf, for that *whereas* on the twenty-ſecond day of May, in the year of our Lord, one thouſand ſeven hundred and eighty three, at Taunton, in the county of Somerſet, in conſideration that

that the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, would buy of the ſaid *Benjamin*, a certain ſteer, at and for a large price, to wit, at and for the price of three pounds thirteen ſhillings, he the ſaid *Benjamin Black*, undertook, and to the ſaid *William*, then and there faithfully promiſed that the ſaid ſteer was ſound; and the ſaid *William* doth aver, that he the ſaid *William* relying on the ſaid promiſe and undertaking of the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the ſaid county, did buy of the ſaid *Benjamin Black* the ſaid ſteer, at and for a large price, to wit, at and for the price of three pounds thirteen ſhillings, yet the ſaid *Benjamin*, contriving and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William*, in this behalf, did not regard his ſaid promiſe and undertaking, but thereby craftily and ſubtlely deceived the ſaid *William* in this, that the ſaid ſteer, at the time of making the ſaid promiſe and undertaking of the ſaid *Benjamin*, was not ſound, but on the contrary thereof, the ſaid ſteer was baned, and by reaſon thereof the ſaid ſteer became, and was of no uſe or value to the ſaid *William*, to wit, at Taunton aforeſaid, in the ſaid county: *And whereas alſo* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at Taunton aforeſaid, in the ſaid county, in conſideration that the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, had then and there bought of the ſaid *Benjamin*, a certain other ſteer, and had then and there paid a certain large ſum of money for the ſame, to wit, the ſum of three pounds thirteen ſhillings, he the ſaid *Benjamin* undertook, and to the ſaid *William*, then and there faithfully promiſed that the ſaid laſt mentioned ſteer, was ſound, yet the ſaid *Benjamin* contriving and wrongfully intending, craftily and ſubtlely to deceive and defraud the ſaid *William*, in this reſpect did not regard his ſaid laſt mentioned promiſe and undertaking, but thereby craftily, and ſubtlely deceived the ſaid *William*, in this, that the ſaid laſt mentioned ſteer, at the time of making the ſaid laſt

mentioned

mentioned promiſe and undertaking of the ſaid *Benjamin*, was not found, but on the contrary thereof, the ſaid laſt mentioned ſteer was baned, and thereby became, and was of no uſe or value to the ſaid *William*, to wit, at Taunton aforeſaid, in the ſaid county; *and whereas* the ſaid *Benjamin*, on the firſt day of May, in the year of our Lord, one thouſand ſeven hundred and eighty-three, at Taunton aforeſaid, in the ſaid county, was indebted to the ſaid *William*, in twenty pounds, of lawful money of Great Britain, for the keeping and depaſturing divers oxen and ſteers, of him the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt for a long time, to wit, for the ſpace of twelve months, then laſt paſt, and for divers quantities of hay, corn, oats, beans, and ſtraw, before that time found and provided by the ſaid *William*, for the ſaid oxen and ſteers, of him the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, and alſo for the care and attendance of them, the ſaid *William*, and his ſervants, before that time done and beſtowed in, and about the ſaid oxen and ſteers of him the ſaid *Benjamin*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſaid day and year aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him, the ſaid ſum of money, when he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted. *And whereas alſo*, the ſaid *Benjamin*, afterwards, to wit, on the day and year laſt aforeſaid, at Taunton aforeſaid, in the ſaid county, in conſideration that he the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, had before that time kept, fed, and depaſtured divers other ſteers and oxen, of him the ſaid *Benjamin*, for a long time, to wit, for the ſpace of other twelve months, then laſt paſt, and had alſo at the like ſpecial inſtance and requeſt of him the ſaid *Benjamin*, before that time found and provided divers other quantities of hay, corn, oats, beans, and ſtraw, for the ſaid laſt mentioned ſteers and oxen, of him the ſaid *Benjamin*, and had alſo before that time, done

and

and beſtowed other work and labour, care and attendance, of him the ſaid *William*, and his ſervants, in and about the laſt mentioned ſteers and oxen, and at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, he the ſaid *Benjamin* undertook to the ſaid *William*, then and there faithfully promiſed to pay him ſo much money as he therefore reaſonably deſerved to have, and he the ſaid *William* doth aver, that he therefore reaſonably deſerved to have of, and from the ſaid *Benjamin*, other twenty pounds of like lawful money of Great Britain, to wit, at Taunton, aforeſaid, in the ſaid county, whereof the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, there had notice. *And whereas alſo* the ſaid *Benjamin*, afterwards to wit, on the ſame day and year laſt aforeſaid, at Taunton aforeſaid, in the county aforeſaid, was indebted to the ſaid *William*, in twenty pounds of lawful money of Great Britain, for ſo much money by him the ſaid *William*, before that time paid and laid out and expended, to, and for the uſe of the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Taunton aforeſaid, in the ſaid county, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay to him the ſaid laſt mentioned ſum of money, when he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted: *And whereas alſo* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Taunton aforeſaid, in the ſaid county, was indebted to the ſaid *William*, in other twenty pounds, of lawful money of Great Britain, for ſo much money by him, the ſaid *Benjamin* before that time had and received to the uſe of him, the ſaid *William*, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Taunton, aforeſaid, in the ſaid county, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him the ſaid laſt mentioned ſum of money, when he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted; *And whereas* alſo the ſaid *Benjamin*, afterwards, to wit,

wit, on the day and year laſt aforeſaid, at Taunton aforeſaid, in the county aforeſaid, was indebted to the ſaid *William* in other twenty pounds of like lawful money; for ſo much money before that time lent and advanced by the ſaid *William* to the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards to wit, on the day and year laſt aforeſaid, at Taunton aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William* to pay to him the ſaid laſt mentioned ſum of money when he ſhould be thereto afterwards requeſted; *yet* the ſaid *Benjamin*, not regarding his aforeſaid five laſt mentioned promiſes and undertakings, but contriving and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William*, hath not yet paid the ſaid ſeveral ſums of money, in the ſaid five laſt mentioned promiſes, contained to the ſaid *William*, or either of them, although ſo to do, he the ſaid *Benjamin* was requeſted by the ſaid *William*, on the day and year laſt aforeſaid, and often afterwards, to wit, at Taunton aforeſaid, in the county aforeſaid; but he to pay the ſame to them or either of them hath hitherto wholly refuſed, and ſtill doth refuſe, to the damage of the ſaid *William* of twenty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff.
C. D. for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe.*

(Treſpaſs on the Caſe.)

Treſpaſs.

Eaſter term, in the twenty-third year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas* the ſaid *Ben-*

Benjamin, on the firſt day of November, in the year of our Lord, one thouſand, ſeven hundred and eighty-two, with force and arms, at the pariſh of Chilton Domer, in the ſaid county of Somerſet, he broke down, knocked down, proſtrated, and deſtroyed the hedges, fences, gates, poſts and rails of the ſaid *William*, of the value of twenty pounds, there lately erected and being; and the wood and materials of the ſaid *William*, thereof coming, of the value of other twenty pounds, ſeized, took, and carried away, and converted and diſpoſed of to his own uſe. *And alſo* for that whereas the ſaid *Benjamin*, at the pariſh of Chilton Domer aforeſaid, in the ſaid county of Somerſet, with force and arms, ſeized, took, and carried away the goods and chattels of the ſaid *William*, of the value of other twenty pounds, there found and being, and converted and diſpoſed thereof to his own uſe, and other injuries to the ſaid *William* there did, to the great damage of the ſaid *William*, and againſt the peace of our ſovereign lord the now king, &c. *And* alſo for that whereas the ſaid *Benjamin*, afterwards, to wit, on the ſame firſt of November, in the ſaid year of our Lord, one thouſand, ſeven hundred and eighty-two, and on divers other days and times between that day and the day of exhibiting the bill of the ſaid *William*, with force and arms, at the ſaid pariſh of Chilton Domer, in the ſaid county of Somerſet, broke down, knocked down, proſtrated, and deſtroyed other the hedges, fences, gates, poſts and rails, to wit, fifty perches of the hedges, fifty perches of the fences, fifty gates, fifty poſts, and fifty perches of the rails of the ſaid *William*, of the value of twenty pounds, there then lately erected and being, and the wood and materials, to wit, twenty cart loads of wood, and twenty cart loads of underwood of the ſaid *William*, thereof coming, of the value of other twenty pounds, ſeized, took and carried away and converted and diſpoſed of to his own uſe; *and alſo* for that the ſaid *Benjamin*, to wit, on the ſaid firſt day of November, in the ſaid year of our Lord, one thouſand ſeven hundred and eighty-two, and on divers other days and times, between that day and the day of exhibiting the bill, of the ſaid *William*, at

the parish of Chilton Domer, aforesaid, in the said county of Somerset, with force and arms, seized and took and carried away, other the goods and chattels of the said *William*, to wit, twenty other cart loads of wood, and twenty other cart loads of underwood, of the said *William*, of the value of other twenty pounds, there then found, and being, and converted and disposed thereof, to his own use, and other injuries to the said *William*, there then did to the great damage of the said *William*, and against the peace of our sovereign lord the now king, whereupon the said *William* says, that he is injured and hath sustained damages to the value of twenty pounds. And thereof he brings suit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to prosecute, { *John Doe*, and *Richard Roe*.

(Trespass vi et armis.)

On Patent.

Hilary term, in the twenty-third year of the reign of king George the Third.

London, to wit. } *William White*, complains of *Benjamin Black*, being in the custody of the marshal of the Marshalsea, of our lord the now king, before the king himself, for that *whereas* our sovereign lord the now king, by his letters patent, sealed with the seal of Great Britain, bearing date at Westminster in the county of Middlesex, the fourteenth day of March in seventeenth year of his reign, which said letters patent, the said *William* now brings here into court, the date whereof is the same day and year aforesaid, *reciting*, that the said *William*, had by his petition, humbly represented unto his majesty, that he had by long study, application and expence, in trying experiments found out and invented, an engine or machine for raising or lifting of water, and which was of great utility and greatly varied from any engine or machine thitherto invented for that purpose, that in regard he was the first and sole inventor of the said engine or machine, and as he apprehended the same would be of public use and benefit to his majesty's subjects, he therefore most humbly prayed his said majesty

jeſty to grant unto him, his executors, adminiſtrators and aſſigns, his royal letters patent for the ſole making and vending his ſaid invention, within that part of his majeſty's kingdom of Great Britain, called England, his dominion of Wales and town of Berwick upon Tweed, for the term of fourteen years, according to the ſtatute in that caſe made and provided, his ſaid majeſty being willing to give encouragement to all arts and inventions, which might be for the public good, was graciouſly pleaſed to condeſcend to his requeſt, and his ſaid majeſty of his ſpecial grace, certain knowledge, and mere motion, by the ſaid letters patent, for himſelf, his heirs and ſucceſſors, did give and grant unto the ſaid *William*, his executors, adminiſtrators and aſſigns, his ſpecial licence, full power and ſole privilege and authority, that he the ſaid *William*, his executors, adminiſtrators and aſſigns, and every of them, by himſelf and themſelves, or by his and their deputy, or deputies, ſervants or agents, or ſuch others as he the ſaid *William*, his executors, adminiſtrators and aſſigns, ſhould at any time agree with, and no others, from time to time, and at all times thereafter, during the term of years therein expreſſed, ſhould and lawfully might make, uſe, exerciſe and vend his ſaid invention, within that part of his majeſty's kingdom of Great Britain called England, his dominion of Wales and town of Berwick upon Tweed, in ſuch manner as to him the ſaid *William*, his executors, adminiſtrators and aſſigns, or any of them, ſhould in their diſcretion ſeem meet; and that he the ſaid *William*, his executors adminiſtrators and aſſigns, ſhould and lawfully might have and enjoy the whole profit and benefit, commodity and advantage, from time to time coming, growing, accruing and ariſing by reaſon of the ſaid invention, for and during the term of years therein mentioned, to have, hold, exerciſe and enjoy the licence, powers, privileges, and advantages therein before granted, or mentioned to be granted, unto the ſaid *William*, his executors, adminiſtrators and aſſigns, for and during and unto the full end and term of fourteen years, from the date of the ſaid letters patent, next and immediately

enſuing, and fully to be compleat, and ended according to the ſtatute in ſuch caſe made and provided, and to the end that he the ſaid *William*, his executors, adminiſtrators and aſſigns, and every of them, might have and enjoy the full benefit, and the ſole uſe and exerciſe of the ſaid invention, according to his majeſty's gracious intention therein before declared, his ſaid majeſty did by the ſaid letters patent for himſelf, his heirs and ſucceſſors, require and ſtrictly command, all and every perſon and perſons, bodies politic and corporate, and all other his majeſty's ſubjects whatſoever, of what eſtate, quality, degree, name or condition ſoever, they ſhould be within that ſaid part of his kingdom of Great Britain called England, his dominion of Wales, and town of Berwick upon Tweed aforeſaid, that neither they nor any of them, at any time during the continuance of the ſaid term of fourteen years thereby granted, either directly or indirectly, ſhould make, uſe or put in practice the ſaid invention, or any part of the ſame ſo attained unto by the ſaid *William* as aforeſaid, nor in any wiſe counterfeit, imitate or reſemble the ſame, nor ſhould make, nor cauſe to be made any addition thereunto or ſubſtraction from the ſame, whereby to pretend himſelf or themſelves the inventor or inventors, deviſor or deviſors thereof, without the licence, conſent or agreement of the ſaid *William*, his executors, adminiſtrators or aſſigns in writing, under his or their hands and ſeal, firſt had and obtained in that behalf, upon ſuch pains and penalties as could, or might be juſtly inflicted on ſuch offenders for their contempts of that his majeſty's royal command, and further to be anſwerable to the ſaid *William*, his executors, adminiſtrators and aſſigns according to law, for his and their damages therein occaſioned. *Provided always*, and the ſaid letters patent, were and ſhould be upon condition, that if at any time during the ſaid term thereby granted, it ſhould be made appear to his ſaid majeſty, his heirs or ſucceſſors, or any ſix or more of his privy council, that his majeſty's grant was contrary to law, or prejudicial, or inconvenient to his majeſty's ſubjects in general, or

that

that the ſaid invention was not a new invention as to the public uſe and exerciſe thereof, in that ſaid part of his majeſty's kingdom of Great Britain, called England, his dominion of Wales, and Town of Berwick upon Tweed aforeſaid, or not invented and found out by the ſaid *William* as aforeſaid, then upon ſignification or declaration thereof to be made by his ſaid majeſty, his heirs or ſucceſſors, under his or their ſignet, or privy ſeal, or by the lords and others of his majeſty's, or their privy council, or any ſix or more of them, under their hands, his ſaid majeſty's letters patent ſhould forthwith ceaſe, determine, and be utterly void, to all intents and purpoſes, any thing therein before contained to the contrary thereof in any wiſe notwithſtanding. *Provided* alſo, that his ſaid majeſty's letters patent, or any thing therein contained, ſhould not extend or be conſtrued to extend to give privilege to the ſaid *William*, his executors, adminiſtrators, or aſſigns, or any of them, to uſe or imitate any invention or work whatſoever which had theretofore been found out or invented by any other of his majeſty's ſubjects whatſoever, and publicly uſed or exerciſed in that ſaid part of his majeſty's kingdom of Great Britain, called England, his dominion of Wales, or town of Berwick upon Tweed aforeſaid, unto whom like letters patent, or privileges, had been then already granted, for the ſole uſe, exerciſe and benefit thereof, it being his majeſty's will and pleaſure that the ſaid *William*, his executors, adminiſtrators and aſſigns, and all and every other perſon and perſons to whom like letters patent or privileges had been then already granted as aforeſaid, ſhould diſtinctly uſe and practice their ſeveral inventions by them invented and found out, according to the true intent and meaning of the ſame reſpective letters patent. *Provided* likewiſe, nevertheleſs, and his ſaid majeſty's letters patent were upon that expreſs condition, That if the ſaid *William*, his executors or adminiſtrators, or any perſon or perſons, which ſhould or might, at any time or times thereafter, during the continuance of that grant, have or claim any right,

title

title or intereſt in law or equity, of, in, or to the power, privileges, and authority, of the ſole uſe and benefit of the ſaid invention, thereby granted, ſhould make any transfer or aſſignment, or any pretended transfer or aſſignment of the ſaid liberty and privilege, or any ſhare or ſhares of the benefit or profit thereof; or ſhould declare any truſt thereof, to or for any number of perſons exceeding the number of five; or ſhould open, or cauſe to be opened, any book or books, for any public ſubſcriptions to be made by any number of perſons, exceeding the number of five, in order to the raiſing any ſum or ſums of money under pretence of carrying on the ſaid liberty or privilege thereby granted; or ſhould, by him or themſelves, or his or their agents or ſervants, receive any ſum or ſums of money whatſoever, of any number of perſons, exceeding the number of five, for ſuch or the like intents or purpoſes; or ſhould preſume to act as a corporate body; or ſhould divide the benefit of his ſaid majeſty's letters patent, or the liberties and privileges thereby by him granted, into any number of ſhares, exceeding the number of five; or ſhould commit, or do, or procure to be committed or done, any act, matter, or thing whatſoever, during ſuch time as ſuch perſon or perſons ſhould have any right or title, either in law or in equity, in or to the ſaid premiſſes, which ſhould be contrary to the true intent and meaning of a certain act of parliament made in the ſixth year of the reign of his ſaid majeſty's late royal great grandfather, king George the firſt, intitled, An act for the better ſecuring certain powers and privileges intended to be granted by his majeſty, by two charters, for aſſurance of ſhips and merchandizes at ſea, and for lending money upon bottomry, and for reſtraining ſeveral extravagant and unwarrantable practices therein mentioned; or in caſe the ſaid power, privilege, or authority, ſhould at any time thereafter become veſted in, or in truſt for more than the number of five perſons, or their repreſentatives, at any one time reckoning, executors or adminiſtrators, as and for the ſingle perſon whom they repreſent, as to ſuch intereſt,

tereſt, as they were or ſhould be intitled to in right of ſuch their eſtates or inteſtates, that then, and in any of the ſaid caſes, his ſaid majeſty's letters patent, and all liberties and advantages whatſoever thereby granted, ſhould utterly ceaſe, determine, and become void, any thing therein before contained to the contrary thereof in any wiſe notwithſtanding. *Provided alſo*, that if the ſaid *William* ſhould not particularly deſcribe and aſcertain the nature of his ſaid invention; and in what manner the ſame was to be performed by an inſtrument in writing, under his hand and ſeal, and cauſe the ſame to be inrolled in his majeſty's high court of chancery, within four calendar months next, and immediately after the date of his majeſty's letters patent, that then his majeſty's letters patent, and all liberties and advantages whatſoever thereby granted, ſhould utterly ceaſe, determine, and become void, any thing before therein contained, to the contrary thereof notwithſtanding; *And* his ſaid majeſty did by the ſaid letters patent, for himſelf and his heirs and ſucceſſors, grant unto the ſaid *William*, his executors, adminiſtrators, and aſſigns, that his ſaid majeſty's letters patent, or the enrollment or exemplification thereof, ſhould be in and by all things good, firm, valid, ſufficient, and effectual, in the law, according to the true intent and meaning thereof; and ſhould be taken, conſtrued, and adjudged, in the moſt favourable and beneficial ſenſe, for the beſt advantage of the ſaid *William*, his executors, adminiſtrators and aſſigns, as well in all his majeſty's courts of record, as elſewhere; and by all and ſingular the officers and miniſters whatſoever of his ſaid majeſty, his heirs and ſucceſſors in that part of his majeſty's kingdom of Great Britain, called England, his dominion of Wales and town of Berwick upon Tweed aforeſaid, and amongſt all and every the ſubjects of his ſaid majeſty, his heirs, and ſucceſſors whatſoever, and whereſoever, notwithſtanding the not full and certain deſcribing the nature or quality of the ſaid invention, or of the materials thereto inducing and belonging, as by the ſaid letters patent more fully appears.

And

And the ſaid *William* further ſays, that it never has yet been made appear, either to our ſaid lord the king, or to any ſix or more of his privy council, that the ſaid letters patent were contrary to law or prejudicial or inconvenient to his majeſty's ſubjects in general; or that the ſaid invention was not a new invention, as to the public uſe and exerciſe thereof in the ſaid part of his majeſty's kingdom of Great Britain, called England, his dominion of Wales, and Town of Berwick upon Tweed, or not invented and found out by the ſaid *William*, as aforeſaid. *And* the ſaid *William* further ſays, that in purſuance and performance of the ſaid proviſo, clauſe, and condition in the ſaid letters patent mentioned, he, the ſaid *William*, by a certain inſtrument in writing, under his hand and ſeal, bearing date the twenty-firſt day of June, in the year of our Lord, one thouſand, ſeven hundred and ſeventy-ſeven, and inrolled on the twenty-ſixth day of June, in the ſaid year of our Lord, one thouſand, ſeven hundred and ſeventy-ſeven, in his majeſty's high court of chancery, (the ſaid court then and ſtill being at Weſtminſter, in the county of Middleſex) did particularly deſcribe and aſcertain the nature of the ſaid invention, as in and by the ſaid inſtrument in writing, now remaining of record in the ſaid high court of chancery, at Weſtminſter aforeſaid, more fully appears; *yet* the the ſaid *Benjamin*, well knowing the premiſes, but deſigning, and maliciouſly intending to injure and prejudice the ſaid *William* in this reſpect, and to deprive him of all the benefits, profits, and advantages of the ſaid invention, and of the ſaid letters patent, on the firſt day of May, in the year of our Lord, one thouſand ſeven hundred and ſeventy-ſeven, and on divers other days and times, between that day and the day of exhibiting the bill of the ſaid *William*, at London aforeſaid, to wit, in the pariſh of Saint Mary le Bow, in the ward of Cheap, unjuſtly and fraudulently, and without the licence, conſent, or agreement of the ſaid *William*, under his hand and ſeal, firſt had and obtained, in this behalf, did uſe and put in practice the

the ſaid invention, in the ſaid letters patent, mentioned and contained, and thereby hindered the ſaid *William* in the ſole exerciſe and enjoyment thereof, which he ought to have had according to the ſaid letters patent, by reaſon whereof the ſaid *William*, during all the time aforeſaid, loſt great profit and advantage of the ſaid invention. *And* the ſaid *William* further ſays, that the ſaid *Benjamin*, further deviſing, and malicioufly intending to injure and prejudice the ſaid *William*, and to deprive him of all the benefits and advantages of the ſaid invention, and of the ſaid letters patent, afterwards, to wit, on the ſaid firſt day of May, in the ſaid year of our Lord one thouſand ſeven hundred and ſeventy-ſeven, and on divers other days and times, between that day and the day of exhibiting the bill of the ſaid *William* at London aforeſaid, in the pariſh and ward aforeſaid, unjuſtly and fraudulently, and without the licence, conſent or agreement of the ſaid *William*, under his hand and ſeal in this behalf, firſt had and obtained, did counterfeit the ſaid invention in the ſaid letters patent mentioned, and did uſe and put in practice an engine or machine which did counterfeit the ſaid invention in the ſaid letters patent, mentioned and contained in great part thereof, and thereby hindred the ſaid *William* in the ſole uſe, exerciſe, and enjoyment thereof, which he ought to have had according to the ſaid letters patent, by reaſon whereof, the ſaid *William*, during all the time laſt aforeſaid, loſt great profit, benefit and advantage of the ſaid invention. *And* the ſaid *William* further ſays, that the ſaid *Benjamin* further deviſing and malicioufly intending to injure and predudice the ſaid *William*, and further to deprive him of all the benefits and advantages of the ſaid invention, and of the ſaid letters patent, afterwards, to wit, on the firſt day of May, in the ſaid year of our Lord one thouſand ſeven hundred and ſeventy ſeven, and on divers other days and times, between that day and the day of exhibiting the bill of the ſaid *William*, at London aforeſaid, in the pariſh and ward aforeſaid, did imitate the ſaid invention in the ſaid letters patent, mentioned, and did uſe and

put in practice an engine or machine, which did imitate the said invention, in the said letters patent, mentioned and contained in great part thereof, and thereby hindered the said *William*, in the sole use, exercise, and enjoyment thereof, which he ought to have had according to the said letters patent, by reason whereof the said *William*, during all the time last aforesaid, lost great profit, benefit, and advantage of the said invention. *And* the said *William* further says that the said *Benjamin* further devising, and maliciously intending to injure and prejudice the said *William*, and further to deprive him of all the benefits, profits, and advantages of the said invention, and of the said letters patent, afterwards, to wit, on the said first day of May in the said year of our Lord one thousand seven hundred and seventy-seven, and on divers other days and times, between that day and the day of exhibiting the bill of the said *William* at London aforesaid, in the parish and ward aforesaid, did resemble the said invention in the said letters patent mentioned, and did use and put in practice an engine or machine which did resemble the said invention in the said letters patent mentioned, and contained in great part thereof, and thereby hindered the said *William* in the sole use, exercise, and enjoyment thereof, which he ought to have had, according to the said letters patent, by reason whereof the said *William* during all the time last aforesaid, lost great profit, benefit, and advantage of the said invention, whereupon the said *William*, saith he is injured, and hath sustained damage to the value of five hundred pounds. And therefore he brings suit, &c.

A. D. for the plaintiff, *C. B.* for the defendant. } Pledges to prosecute { *John Doe*, and *Richard Roe*.

(Trespass on the Case.)

For the board, cloathing, and education of an infant, brought againſt his father.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the firſt day of June, in the year of our Lord one thouſand ſeven hundred and eighty-two, at Weſtminſter, in the county aforeſaid, was indebted to the ſaid *William* in fifty pounds of lawful money of Great Britain, for meat, drink, waſhing, lodging, cloaths, and other neceſſaries, before that time found and provided by the ſaid *William*, for one *John* an infant ſon, of the ſaid *Benjamin*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, and the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed, that he the ſaid *Benjamin* would well and truly pay to the ſaid *William* the ſaid ſum of fifty pounds, whenever he the ſaid *Benjamin*, ſhould be thereto afterwards requeſted; *and whereas* the ſaid *Benjamin* afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William* had before that time, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, found and provided for the ſaid *John*, the infant ſon, of the ſaid *William*, other meat, drink, waſhing, lodging, cloaths, and other neceſſaries, undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin*, would well and truly pay to the ſaid *William* ſo much money as he reaſonably deſerved to have for the meat, drink, waſhing, lodging, cloaths, and other neceſſaries, laſt mentioned, whenever he the ſaid *Benjamin* ſhould be thereto, after-

wards requeſted; *and* the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin*, other fifty pounds of like lawful money, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin* then and there had notice. *And whereas* the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at Weſtminſter, aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William* had before that time, at the like requeſt of the ſaid *Benjamin*, taught and inſtructed the ſaid *John* the infant, in the Engliſh, Latin and other tongues, and in the art of writing arithmetic, and divers other arts, and had beſtowed divers other inſtructions on the ſaid *John* the infant ſon, of the ſaid *Benjamin*, undertook, and to the ſaid *William* then and there faithfully promiſed, that he the ſaid *Benjamin*, would well and truly pay to the ſaid *William* ſo much money as he reaſonably deſerved to have for the ſame; *And* the ſaid *William* in fact ſays, that he therefore reaſonably deſerved to have of the ſaid *Benjamin*, other fifty pounds of like lawful money, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin* then and there had notice. *And whereas*, the ſaid *Benjamin*, afterwards, to wit, on the eighteenth day of Auguſt, in the year aforeſaid, at Weſtminſter, aforeſaid, was indebted unto the ſaid *William*, in the ſum of fifty pounds, of lawful money of Great Britain, for ſo much money by the ſaid *William*, before that time, lent and advanced, to the ſaid *Benjamin*, at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there, faithfully promiſed to pay unto him the ſaid ſum of fifty pounds, whenever, afterwards, he the ſaid *Benjamin* ſhould be thereunto requeſted; *And whereas* alſo, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Benjamin*, was indebted to the ſaid *William*, in the further ſum of fifty pounds, of like lawful money, for

for ſo much money by the ſaid *William*, before that time paid, laid out, and expended, for the ſaid *Benjamin*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Benjamin*, ſhould be thereunto, afterwards, requeſted; *nevertheleſs* the ſaid *Benjamin*, not regarding his ſaid ſeveral promiſes and undertakings, in form aforeſaid made, but contriving and fraudulently intending, craftily and ſubtlely to deceive, and defraud the ſaid *William* in this reſpect, hath not paid the ſaid ſeveral ſums of money, or any part thereof, to the ſaid *William*, although the ſaid *Benjamin*, afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, and often ſince, was by the ſaid *William* thereto requeſted, but to pay the ſame to the ſaid *William*, the ſaid *Benjamin*, hath hitherto refuſed, and ſtill doth refuſe, to the damage of the ſaid *William* of one hundred pounds, And thereupon his brings ſuit, &c.

A B. for the plaintiff, *C D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.
(Treſpaſs on the Caſe.)

By aſſignees on a note indorſed to a bankrupt.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *Richard Red* and *George Green*, aſſignees of the eſtate and effects of *Oliver Orange*, a bankrupt, according to the form, force and effect of the ſeveral ſtatutes made and now in force concerning bankrupts, complain of *Benjamin Black* being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the now king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the

firſt

firſt day of June, in the year of our Lord one thouſand ſeven hundred and eighty two, at Weſtminſter, in the county aforeſaid, made his certain note in writing, ſubſcribed with his own proper hand, commonly called a promiſſory note, bearing date the ſame day and year, by which note the ſaid *Benjamin* promiſed to pay to one *William White*, by the name and deſcription of Mr. *William White*, or order, the ſum of forty pounds, three months after date, for value received by the ſaid *Benjamin*, and the ſaid ſum of money being unpaid, the ſaid *William* afterwards, to wit, on the ſame day and year abovementioned, at Weſtminſter aforeſaid, in the county aforeſaid, indorſed the ſaid note, his own hand being thereunto ſubſcribed; and by the ſaid indorſement appointed the contents of the ſaid note to be paid to the ſaid *Oliver*, or his order, for value received by the ſaid *William* of which premiſes the ſaid *Benjamin* afterwards, to wit, on the ſame day and year at Weſtminſter aforeſaid, in the county aforeſaid, had notice, by reaſon whereof, and by force of the ſtatute, in that caſe made and provided, the ſaid *Benjamin* became liable to pay to the ſaid *Oliver*, the ſaid ſum of money contained in the ſaid note; and being ſo liable, the ſaid *Oliver* became a bankrupt within the true intent and meaning of the ſeveral ſtatutes made concerning bankrupts, ſome or one of them; and the ſaid note, and the money due thereon, among other things, was in due form of law, according to the form of the ſeveral ſtatutes made and provided concerning bankrupts, ſome or one of them, aſſigned to the ſaid *Richard* and *George*, by means whereof the ſaid *Benjamin* became liable to pay to the ſaid *Richard* and *George*, the ſaid ſum of money mentioned in the ſaid promiſſory note; and being ſo liable, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the fourth day of September, in the ſame year of our Lord aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *Richard* and *George*, then and there faithfully promiſed, that he the ſaid *Benjamin* would pay to the ſaid *Richard* and *George*, the ſaid ſum of money in the ſaid promiſſory

miſſory note mentioned, when he ſhould be thereunto requeſted: *And whereas* alſo the ſaid *Benjamin*, on the ſaid firſt day of June, in the year of our Lord aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, was indebted to the ſaid *Oliver* in another ſum of forty pounds, of lawful money of Great Britain, for ſo much money by the ſaid *Oliver*, for the ſaid *Benjamin* and for the uſe of the ſaid *Benjamin* before that time paid laid out and expended at his ſpecial inſtance and requeſt, *and* the ſaid *Benjamin* being ſo indebted to the ſaid *Oliver*, the ſaid *Oliver* became a bankrupt within the true intent and meaning of the ſeveral ſtatutes made concerning bankrupts, ſome or one of them; and the ſaid ſum of forty pounds among things, was in due form of law, according to the form of the ſtatute made and provided againſt bankrupts, ſome or one of them, aſſigned to the ſaid *Richard* and *George*, by means whereof the ſaid *Benjamin* became indebted and liable to pay to the ſaid *Richard* and *George*, the ſaid forty pounds laſt mentioned; and in conſideration thereof, he the ſaid *Benjamin*, afterwards, to wit, on the ſame fourth day of September, in the year afore mentioned, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *Richard* and *George*, that he the ſaid *Benjamin* would well and truly pay and ſatisfy the ſaid forty pounds, to the ſaid *Richard* and *George*, when he ſhould be afterwards thereunto requeſted: *Yet* the ſaid *Benjamin* not regarding his ſaid ſeveral promiſes and undertakings, ſo by him in form aforeſaid made, but contriving and fraudulently intending, craftily and ſubtlely to deceive, and defraud the ſaid *Richard* and *George*, in this behalf hath not yet paid the ſaid ſeveral ſums of money, either to the ſaid *Oliver* before he became bankrupt, or to the ſaid *Richard* and *George*, or to either of them ſince the ſaid *Oliver* became a bankrupt, although ſo to do the ſaid *Benjamin* was requeſted by the ſaid *Oliver* before he became a bankrupt, and by the ſaid *Richard* and *George*, aſſignees as aforeſaid, often times ſince the ſaid *Oliver* became a bankrupt, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, but to pay the

ſame

ſame to the ſaid *Richard* and *George*, he the ſaid *Benjamin* hitherto hath wholly refuſed, and ſtill doth refuſe, to the ſaid *Richard* and *George*, aſſignees as aforeſaid, their damage of one hundred pounds. And therefore they bring ſuit, &c.

A. B. for the plaintiff. *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

For an executor for goods ſold and delivered.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* executor of the laſt will and teſtament of *John White*, deceaſed, complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the firſt day of December, in the year of our Lord, one thouſand ſeven hundred and eighty two, to wit, at Weſtminſter, in the ſaid county, was indebted to the ſaid *John* in his life-time, in fifty pounds, of lawful money of Great Britain, for divers goods, wares, and merchandizes, by the ſaid *John*, in his life-time, before that time, ſold and delivered to the ſaid *Benjamin* and at his ſpecial inſtance and requeſt; and being ſo indebted, he the ſaid *Benjamin* in conſideration therof, afterwards to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook and to the ſaid *John*, then and there faithfully promiſed that he the ſaid *Benjamin* would well and truly pay and ſatisfy the ſaid *John*, the ſaid ſum of fifty pounds laſt mentioned, whenever he ſhould be therennto requered. *And whereas* afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, and in conſideration that the ſaid *John* in his life-time, at the like requeſt of the ſaid *Benjamin*, had before that time ſold and delivered

to

to the ſaid *Benjamin*, divers other goods, wares, and merchandizes, he the ſaid *Benjamin* undertook, and faithfully promiſed the ſaid *John* in his life-time, to pay him ſo much money as he therefore reaſonably deſerved to have; *and* the ſaid *William*, executor as aforeſaid, avers, that he therefore reaſonably deſerved to have of the ſaid *Benjamin* other fifty pounds of like lawful money, to wit, at Weſtminſter aforeſaid in the county aforeſaid, whereof the ſaid *Benjamin* there had notice. *And whereas* alſo, afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Benjamin*, was indebted to the ſaid *John*, in the further ſum of fifty pounds, of like lawful money, for ſo much money by the ſaid *John* before that time paid, laid out, and expended, for the ſaid *Benjamin*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *John* to pay him the ſaid ſum of fifty pounds laſt metioned when he the ſaid *Benjamin*, ſhould be thereunto, afterwards, requeſted; yet the ſaid *Benjamin* not regarding his ſaid ſeveral promiſſes, and undertakings, in form aforeſaid made, but contriving, and fraudulently intending, and craftily, and ſubtlely to deceive and defraud the ſaid *John* in his life-time, and the ſaid *William*, executor as aforeſaid, ſince his death, in this reſpect, hath not yet paid the ſaid ſeveral ſums of money, or any part thereof to the ſaid *John* in his life time, or to *William* executor as aforeſaid ſince his death, or to either of them, (although ſo to do the ſaid *Benjamin* was requeſted by the ſaid *John* in his life-time, oftentimes, and by the ſaid *William* executor as aforeſaid, ſince his death, to wit, on the twentieth day of December, in the year aforeſaid, at Weſtminſter aforeſaid), but he to do this hath hitherto wholly refuſed, and ſtill refuſes to the ſaid *William*, executor as aforeſaid, his damage of one hundred pounds. And therefore he brings ſuit, &c. and he brings into court here the letters teſtamentary of the ſaid *John* whereby it appears to the court here,

that the ſaid *William* is the executor of the laſt will and teſtament of the ſaid *John* and hath the adminiſtration thereof, &c.

A. B. for the plaintiff. *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe.*

(Treſpaſs on the Caſe.)

Againſt an executrix for goods ſold and delivered to teſtator.

Middleſex, to wit. } *William White* complains of *Mary Black*, widow and executrix of the laſt will and teſtament of *Benjamin Black*, deceaſed, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, for that *whereas* the ſaid *Benjamin* in his life time, to wit, on the firſt day of December, in the year of our Lord, one thouſand ſeven hundred and eighty two, to wit, at Weſtminſter, in the ſaid county, was indebted to the ſaid *William* in twenty pounds of lawful money of Great Britain, for divers goods, wares, and merchandize, by the ſaid *William*, before that time ſold and delivered to the ſaid *Benjamin*, in his life-time, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin* in his life-time, in conſideration thereof, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed that he, the ſaid *Benjamin*, would well and faithfully pay and ſatisfy to the ſaid *William*, the ſaid ſum of twenty pounds, whenever he ſhould be thereunto requeſted. *And whereas* afterwards, to wit, on the ſame day and year aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, in his life-time, had before that time ſold and delivered to the ſaid *Benjamin* in his life-time, divers other goods, wares, and merchandizes, he the ſaid *Benja-*

min in his life-time, then and there undertook, and faithfully promiſed the ſaid *William*, to pay to him ſo much money as he therefore reaſonably deſerved to have and the ſaid *William* avers, that he therefore reaſonably deſerved to have, of the ſaid *Benjamin* in his life-time, other twenty pounds of like lawful money, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin* in his life-time there had notice: *And whereas* the ſaid *Benjamin* in his life-time, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, was indebted to the ſaid *William* in other twenty pounds of like lawful money, for money by the ſaid *William*, before that time laid out, expended, and paid for the ſaid *Benjamin* in his life-time, and at his ſpecial inſtance and requeſt; and being ſo indebted, he the ſaid *Benjamin* in his life time, in conſideration thereof, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed that he the ſaid *Benjamin*, would well and faithfully pay and ſatisfy to the ſaid *William*, the ſaid ſum of twenty pounds, laſt mentioned, whenever he the ſaid *Benjamin* ſhould be afterwards thereto requeſted, yet the ſaid *Benjamin* in his life-time, and the ſaid *Mary*, executrix as aforeſaid, ſince his death, not regarding the ſaid ſeveral promiſes and undertakings, ſo by the ſaid *Benjamin* in his life time made, in this behalf as aforeſaid, but contriving, and fraudulently intending, craftily and ſubtlely, to deceive and defraud the ſaid *William* in this reſpect, have not, nor hath either of them yet paid the ſaid ſeveral ſums of money, or any part thereof to the ſaid *William*, although ſo to do the ſaid *Benjamin*, in his life-time was requeſted by the ſaid *William*, and alſo the ſaid *Mary*, executrix as aforeſaid, ſince the death of the ſaid *Benjamin*, afterwards, to wit, on the firſt day of January, in the year of our Lord, one thouſand ſeven hundred and eighty-three, and often afterwards, to wit, at Weſtminſter aforeſaid, in the county aforeſaid; but the ſaid *Benjamin*, in his life-time,

and the ſaid *Mary*, executrix as aforeſaid, ſince his death, hath hitherto wholly refuſed, and ſtill refuſes to pay the ſame, to the ſaid *William*, his damage of thirty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

For goods ſold and delivered to a teſtator, brought againſt his executor by an adminiſtrator.

Trinity term, in the twenty-third year of the reign of king George the Third.

London, to wit. } *William White* adminiſtrator of the goods and chattels late of *John White* deceaſed, at the time of his death, who died inteſtate, unadminiſtered by *Eleanor White*, widow, alſo deceaſed, late adminiſtratrix of the ſame goods and chattels, complains of *Benjamin Black*, which ſaid *Benjamin* is ſole executor of the laſt will and teſtament of *Edward Red*, deceaſed, being in the cuſtody of the marſhal of the Marſhalſea of our ſovereign lord the king, before the king himſelf, for that *whereas* the ſaid *Edward* in his life-time, to wit, on the firſt day of June, in the year of our Lord, one thouſand ſeven hundred and eighty, at London aforeſaid, in the pariſh of Saint Mary-le-Bow, in the ward of Cheap, was indebted to the ſaid *John*, in his life-time, in the ſum of forty pounds, for divers goods, wares, and merchandizes, by the ſaid *John*, before that time ſold and delivered to the ſaid *Edward*, and at his ſpecial inſtance and requeſt; and being ſo indebted, he the ſaid *Edward* in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and to the ſaid *John*, then and there faithfully promiſed, that he the ſaid *Edward*, would well and truly pay and ſatisfy him the ſaid *John*, the ſaid ſum of forty pounds, whenever afterwards he the ſaid *Edward* ſhould be thereunto requeſted:

queſted: *And whereas* the ſaid *Edward* in his life-time afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, in conſideration that the aforeſaid *John* in his life-time, had before that time ſold and delivered unto the aforeſaid *Edward*, divers other goods, wares, and merchandizes, at his ſpecial inſtance and requeſt, undertook, and then and there faithfully promiſed the ſaid *John*, that he the ſaid *Edward*, would well and truly pay and ſatisfy him the ſaid *John*, ſo much money as the goods, wares, and merchandizes laſt mentioned, were reaſonably worth at the time of the ſale and delivery thereof, whenever afterwards he the ſaid *Edward*, ſhould be thereunto requeſted; and the aforeſaid *William* avers, that the goods, wares, and merchandizes laſt mentioned were, at the time of the ſale and delivery thereof, reaſonably worth the ſum of forty pounds, of like lawful money, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, whereof the aforeſaid *Edward* in his life-time then and there had notice; *And whereas* the ſaid *Edward*, in his life-time, afterwards to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, accounted with the ſaid *John*, in his life-time, concerning divers other ſums of money before that time due and owing by him the ſaid *Edward*, unto the aforeſaid *John*, and then in arrear and unpaid, and upon that account the aforeſaid *Edward* was found to be in arrear unto the ſaid *John*, in another ſum of forty pounds, of like lawful money, and he the ſaid *Edward* being ſo found in arrear as aforeſaid, in conſideration thereof, afterwards, to wit, on the ſame day and year aforeſaid, at London aforeſaid, in the pariſh and ward aforeſaid, undertook, and then and there faithfully promiſed the ſaid *John*, that he the ſaid *Edward*, would well and truly pay and ſatisfy him the ſaid *John*, the ſaid laſt mentioned ſum of forty pounds, whenever afterwards he the ſaid *Edward* ſhould be thereunto requeſted; *nevertheleſs* the aforeſaid *Edward* in his life-time, and the ſaid *Benjamin* ſince his death, not regarding the ſaid ſeveral promiſes and undertakings

ings aforesaid, so made by him the aforesaid *Edward*, in manner and form aforesaid, but contriving and fraudulently intending, craftily and subtlely, to deceive and defraud the said *John* in his life-time, and the said *William* since his decease in this respect, did not pay the aforesaid several sums, or any part thereof, to the said *John* in his life-time, or to the aforesaid *Eleanor*, after his death, or after the death of the said *Eleanor*, to him the said *William* (to whom administration of the goods, chattels, and credits of the said *John* at the time of his death left unadministered by the said *Eleanor*, was by *Thomas*, by divine providence, archbishop of Canterbury, primate of all England, and metropolitan, on the first day of January, in the year of our Lord, one thousand seven hundred and eighty-two, at London aforesaid, in the parish and ward aforesaid duly committed) nor in any manner satisfied them, or any of them, for the same, (although the said *Edward* in his life-time, to wit, on the said first day of June, in the year of our Lord, one thousand seven hundred and eighty, by the said *John*, in his life-time; and also after his death, and the death of the said *Eleanor*, to wit, on the first day of June, in the year of our Lord, one thousand seven hundred and eighty-three, the said *Benjamin* was by the said *William* requested so to do,) but the said *Edward* in his life-time refused, and the said *Benjamin*, since his decease, have refused to pay the aforesaid several sums of money, or to make any satisfaction for the same to the said *John*, in his life-time, or to the said *Eleanor*, since his death, or to the said *William*, since the decease of the said *Eleanor*, to the damage of the said *William*, of one hundred pounds, and the said *William* brings here into court the letters of administration aforesaid, whereby it is testified, that administration was granted to him in form aforesaid.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to prosecute, { *John Doe*, and *Richard Roe*.

(Trespass on the Case.)

For

For an attorney and ſol citor's bill.

Hilary term in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our lord the king, before the king himſelf, of a plea of treſpaſs on the caſe, for that *whereas*, the ſaid *Benjamin*, on the firſt day of November, in the year of our Lord, one thouſand ſeven hundred and eighty-two, to wit, at Weſtminſter, in the ſaid county, was indebted to the ſaid *William*, in fifty pounds of lawful money of Great Britain, for the work and labour, care and diligence, of the ſaid *William*, before that time done, performed and beſtowed by the ſaid *William*, as the attorney or ſolicitor of the ſaid *Benjamin*, and about the drawing, writing, and engroſſing of divers writings, and the going and making of divers journies, and giving his attendance in and about the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and at the ſpecial inſtance and requeſt of the ſaid *Benjamin*, and upon his retainer, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed the ſaid *William*, to pay to him the ſaid ſum of fifty pounds, whenever he the ſaid *Benjamin* ſhould be thereunto requeſted. *And whereas* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William*, as the attorney or ſolicitor of the ſaid *Benjamin*, had before that time done, performed, and beſtowed other his work and labour, care and diligence, in and about the drawing, writing, and ingroſſing of divers other writings, and the going, making, and performing of divers others journies, and giving other his attendance in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and at the like ſpecial inſtance and requeſt, and upon his retainer, he

he the ſaid *Benjamin* undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him ſo much money as he therefore reaſonably deſerved to have, and the ſaid *William* avers that he therefore reaſonably deſerved to have of the ſaid *Benjamin*, other fifty pounds, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year then had notice; *And whereas* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year at Weſtminſter aforeſaid, in the county aforeſaid, was indebted to the ſaid *William*, in other fifty pounds, for money by the ſaid *William*, before that time laid out, expended, and paid for the ſaid *Benjamin*, as the attorney, or ſolicitor, of the ſaid *Benjamin*, and upon his retainer, in and about the proſecuting and defending divers ſuits at law and in equity in this court here, and other his majeſty's courts of record at Weſtminſter, and for his fees, labour, and care in and about proſecuting and defending the ſame, and alſo for the work and labour of the ſaid *William*, before that time done and performed in and about other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay to him the ſaid ſum of fifty pounds, laſt mentioned, whenever he the ſaid *Benjamin*, ſhould be afterwards thereunto requeſted; *And whereas* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year, at Weſtminſter, aforeſaid, in the county aforeſaid, in conſideration that the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Benjamin*, and upon his retainer, had, before that time, proſecuted and defended divers other ſuits in law and in equity in this court here, and other his majeſty's courts of record at Weſtminſter aforeſaid, and elſewhere, as the attorney and ſolicitor of the ſaid *Benjamin*, and for the ſaid *Benjamin*, and had alſo at the like ſpecial inſtance and requeſt of the ſaid

Benjamin,

Benjamin, done and performed other the buſineſs of the ſaid *Benjamin*, and for the ſaid *Benjamin*, he the ſaid *Benjamin* then and there undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him ſo much money as he reaſonably deſerved to have for the ſame; and the ſaid *William* avers that he therefore reaſonably deſerved to have of the ſaid *Benjamin* for the ſame, other fifty pounds; to wit, at Weſtminſter aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year there had notice; *And whereas* the ſaid *Benjamin*, afterwards, to wit, on the eighteenth day of Auguſt, in the year aforeſaid, at Weſtminſter, aforeſaid, was indebted unto the ſaid *William*, in the ſum of fifty pounds, of lawful money of Great Britain, for ſo much money by the ſaid *William*, before that time lent and advanced, to the ſaid *Benjamin*, at his ſpecial inſtance and requeſt, and being ſo indebted, he, the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook and to the ſaid *William*, then and there faithfully promiſed to pay to him the ſaid ſum of fifty pounds, whenever, afterwards, he the ſaid *Benjamin* ſhould be thereto afterwards requeſted; *And whereas* alſo, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid *Benjamin*, was indebted to the ſaid *William*, in the further ſum of fifty pounds, of like lawful money, for ſo much money by the ſaid *William* before that time paid, laid out, and expended, for the ſaid *Benjamin*, and at his like ſpecial inſtance and requeſt, and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter, aforeſaid, in the county aforeſaid, undertook, and then there faithfully promiſed the ſaid *William*, to pay him the ſaid ſum of money laſt mentioned, when he the ſaid *Benjamin*, ſhould be thereunto afterwards requeſted; *And whereas* the ſaid *William*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at

minſter aforeſaid, in the county aforeſaid, accounted together with the ſaid *Benjamin*, of and concerning divers other ſums of money, before that time due and owing from the ſaid *Benjamin* to the ſaid *William*, and being then in arrear and unpaid; and upon ſuch account the ſaid *Benjamin* was then found in arrear to the ſaid *William* in a large ſum of money, to wit, in the ſum of fifty pounds; and being ſo indebted, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay to him the ſaid *William*, the ſaid ſum of fifty pounds, when he the ſaid *Benjamin* ſhould be thereto afterwards requeſted; yet the ſaid *Benjamin* in no wiſe regarding his aforeſaid ſeveral promiſes and undertakings, ſo by him made in this behalf as aforeſaid, but contriving, and fraudulently intending, craftily, and ſubtlely to deceive and defraud the ſaid *William*, in this behalf, hath not yet paid the ſaid ſeveral ſums of money, or any part thereof, to the ſaid *William*, (altho' ſo to do, he the ſaid *Benjamin* was requeſted by the ſaid *William*, afterwards, to wit, on the ſame day and year, and often afterwards, to wit, at Weſtminſter aforeſaid, in the county aforeſaid,) but he to pay the ſame, hath hitherto wholly refuſed, and ſtill refuſes to the ſaid *William* his damage of one hundred pounds. And therefore he brings ſuit, &c.

M. B. for the plaintiff, *C. D.* for the defendant. (*Treſpaſs on the caſe.*) } Pledges to proſecute { *John Doe*, and *Richard Roe*.

On promiſſory notes, indorſee againſt drawee.

Hilary term in the ſixteenth year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf

ſelf, for that *whereas* one *Bartholomew Brown*, after the firſt day of May, which was in the year of our Lord one thouſand ſeven hundred and five, that is to ſay on the thirtieth day of November, in the year of our Lord one thouſand ſeven hundred and ſeventy-four, at Weſtminſter, in the ſaid county of Middleſex, made his certain note in writing, commonly called a promiſſory note, with his own proper hand thereunto ſubſcribed, bearing date the ſame day and year laſt aforeſaid, and then and there delivered the ſaid note to the ſaid *Benjamin*, by which ſaid note the ſaid *Bartholomew* promiſed to pay to the ſaid *Benjamin*, by the name and deſcription of Mr. *Benjamin Black*, or order, fifty pounds, two months after date, for value received; *And* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid ſum of fifty pounds, in the ſaid note mentioned, being entirely unpaid to him, indorſed the ſaid note, with his own proper hand thereunto ſubſcribed, and by that indorſement did order and appoint, the ſaid ſum of money, in the ſaid note mentioned, to be paid to one *Richard Red*, or order, for value received, and then and there delivered the ſaid note, ſo indorſed, as aforeſaid, to the ſaid *Richard*, and the ſaid *Richard*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, indorſed the ſaid note, with his own proper name thereunto ſubſcribed, and by that indorſement did order and appoint the ſaid ſum of fifty pounds, in the ſaid note mentioned, to be paid to the ſaid *William*, for value received, and then and there delivered the ſaid note, ſo indorſed, as aforeſaid, to the ſaid *William*, of which ſaid ſeveral indorſements, the ſaid *Bartholomew*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, had notice; *And* the ſaid *William* in fact ſaith, that the ſaid *Bartholomew*, although often requeſted, hath not yet paid him the ſaid ſum of money, in the ſaid note mention-

ed, or any part thereof, but to pay the ſame to the ſaid *William*, he the ſaid *Bartholomew* hath hitherto altogether refuſed, and ſtill doth refuſe, and the ſame now remains unpaid to the ſaid *William*, of all which ſaid premiſes the ſaid *Benjamin*, afterwards, to wit, on the third day of February, in the year of our Lord one thouſand ſeven hundred and ſeventy five, at Weſtminſter aforeſaid, in the county aforeſaid, had notice, by reaſon whereof, and alſo by force of the ſtatute in ſuch caſe made and provided, the ſaid *Benjamin* became liable to pay to the ſaid *William*, the ſaid ſum of fifty pounds, in the ſaid note mentioned, whenever afterwards he, the ſaid *Benjamin*, ſhould be thereunto afterwards requeſted; *And* being ſo liable he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him the ſaid ſum of fifty pounds, in the ſaid note contained, whenever he the ſaid *Benjamin*, ſhould be thereunto afterwards requeſted. *And alſo whereas* the ſaid *Bartholomew*, on the ſeventeenth day of December, in the ſaid year of our Lord, one thouſand ſeven hundred and ſeventy-four, at Weſtminſter, in the ſaid county of Middleſex, made his certain other note in writing, commonly called a promiſſory note, with his own proper hand thereunto ſubſcribed, bearing date the ſame day and year laſt aforeſaid, and then and there delivered the ſaid laſt mentioned note, to the ſaid *Benjamin*, by which ſaid laſt mentioned note, the ſaid *Bartholomew* promiſed to pay to the ſaid *Benjamin*, by the name and deſcription of Mr. *Benjamin Black*, or order, fifty pounds, two months after date, for value received; *And* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, the ſaid ſum of money, in the ſaid laſt mentioned note contained, being entirely unpaid to him, indorſed the ſame, his own proper hand being thereunto ſubſcribed, and by that indorſement did order and appoint the ſaid ſum of fifty pounds, therein mentioned, to be paid to the ſaid *Richard*, or his order, for value received,

and

and then and there delivered the ſaid laſt mentioned note, ſo indorſed, as aforeſaid, to the ſaid *Richard*, and the ſaid *Richard*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, indorſed the ſaid laſt mentioned note, his own proper hand being thereunto ſubſcribed, and by that indorſement did order and appoint the ſaid ſum of fifty pounds, in the ſaid laſt mentioned note, contained to be paid to the ſaid *William*, for value received, and then and there delivered the ſaid laſt mentioned note, ſo indorſed as aforeſaid to the ſaid *William*, of which ſaid ſeveral indorſements on the ſaid laſt mentioned note, the ſaid *Bartholomew*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, had notice, *and* the ſaid *William* in fact ſaith that the ſaid *Bartholomew*, although often requeſted, hath not yet paid him the ſaid ſum of fifty pounds, in the ſaid laſt mentioned note, contained or any part thereof; but to pay the ſame to the ſaid *William*, he the ſaid *Bartholomew*, hath hitherto altogether refuſed, and ſtill doth refuſe, and the ſame now remains unpaid to the ſaid *William*, of all which ſaid premiſes the ſaid *Benjamin*, afterwards, to wit, on the twentieth day of February, in the ſaid year of our Lord, one thouſand ſeven hundred and ſeventy-five, at Weſtminſter aforeſaid, in the county aforeſaid, had notice, by reaſon whereof, and alſo by force of the ſtatute in ſuch caſe made and provided, the ſaid *Benjamin* became liable to pay to the ſaid *William*, the ſaid ſum of fifty pounds, in the ſaid laſt mentioned note contained, whenever afterwards he the ſaid *Benjamin* ſhould be thereunto requeſted, and being ſo liable, he the ſaid *Benjamin* in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him the ſaid ſum of fifty pounds, in the ſaid laſt mentioned note contained, whenever he the ſaid *Benjamin*, ſhould be thereunto afterwards requeſted. *And alſo whereas* the ſaid *Benjamin*, afterwards to wit, on the third day of February, in the year

year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, was indebted to the ſaid *William*, in the ſum of one hundred and thirty pounds, of lawful money of Great Britain, for ſo much money by the ſaid *William*, to and for the uſe of the ſaid *Benjamin*, and at his ſpecial inſtance and requeſt, before that time, there paid, laid out and expended; and being ſo indebted, he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him the ſaid ſum of money laſt mentioned, whenever he the ſaid *Benjamin* ſhould be thereunto afterwards requeſted. *And alſo whereas* the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, was indebted to the ſaid *William*, in another ſum of one hundred and thirty pounds, of like lawful money, for ſo much money, by the ſaid *Benjamin*, to and for the uſe of the ſaid *William*, before that time there had and received; and being ſo indebted he the ſaid *Benjamin*, in conſideration thereof, afterwards, to wit, on the ſame day and year laſt aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, undertook, and to the ſaid *William*, then and there faithfully promiſed to pay him the ſaid ſum of one hundred and thirty pounds laſt mentioned, whenever he the ſaid *Benjamin*, ſhould be thereunto afterwards requeſted. *Nevertheleſs*, the ſaid *Benjamin*, not regarding his ſaid ſeveral promiſes and undertakings ſo made as aforeſaid, but contriving, and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William* in this reſpect, hath not yet paid him the ſaid ſeveral ſums of money above mentioned, or any part thereof, although ſo to do, he the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year laſt aforeſaid, and oftentimes ſince, at Weſtminſter aforeſaid, in the county aforeſaid, was by the ſaid *William* requeſted; but to pay the ſame to the ſaid *William*, he the ſaid *Benjamin*, hath hitherto altogether

together refuſed, and ſtill doth refuſe, to the damage of the ſaid *William*, of two hundred pounds. And thereupon he brings ſuit, &c.

A. B. for the plaintiff. *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

For an apothecary, againſt huſband and wife, for medicines, &c. for the wife whilſt ſole.

Hilary term, in the twelfth year of the reign of king George the Third.

Somerſetſhire, to wit. } *William White*, complains of *Benjamin Black*, and *Dorothy* his wife, late *Dorothy Banks*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf; for that *whereas*, the ſaid *Dorothy* whilſt ſhe was ſole, and before her intermarriage with the ſaid *Benjamin*, to wit, on the firſt day of Auguſt, in the year of our Lord, one thouſand ſeven hundred and ſeventy, at Taunton, in the ſaid county of Somerſet, was indebted to the ſaid *William*, then and for divers years then laſt paſt, being an apothecary, and the art of an apothecary, during all the time aforeſaid, uſing and exerciſing, in ten pounds, for work and labour, care, and diligence, of the ſaid *William*, by the ſaid *William*, at the ſpecial inſtance and requeſt of the ſaid *Dorothy*, whilſt ſhe was ſole before that time, done performed and beſtowed, in and about the healing, and curing of the ſaid *Dorothy*, whilſt ſhe was ſole of divers diſeaſes and maladies, under which ſhe had laboured and languiſhed, and for divers medicines and plaiſters, and other neceſſary things before that time found, provided, uſed, and applied by the ſaid *William*, at the like ſpecial inſtance and requeſt of the ſaid *Dorothy*, whilſt ſhe was ſole in that reſpect, and being ſo indebted, ſhe the ſaid *Dorothy*, whilſt ſhe was ſole in conſideration thereof, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid ten pounds, when ſhe the ſaid

Dorothy

Dorothy ſhould be thereto arterwards requeſted; *And Whereas* alſo, to wit, the ſame day and year aforeſaid at Taunton aforeſaid in conſideration that the ſaid *William* (being an apothecary as aforeſaid uſing the ſaid art) at the like inſtance and requeſt of the ſaid *Dorothy*, whilſt ſhe was ſole, had before that time done, performed, and beſtowed other his work and labour, care and diligence, in and about the healing and curing of the ſaid *Dorothy*, whilſt ſhe was ſole, of divers other diſeaſes and maladies, under-which ſhe had laboured and languiſhed and had in that reſpect at the like inſtance and requeſt of the ſaid *Dorothy*, found, provided, uſed, and applied, divers other medicines and plaiſters, and other neceſſary things ſhe the ſaid *Dorothy*, whilſt ſhe was ſole, undertook, and then and there faithfully promiſed the ſaid *William* to pay him as much money as he therefore reaſonably deſerved to have, when ſhe the ſaid *Dorothy* ſhould be thereto afterwards required, and the ſaid *William* avers that he therefore reaſonably deſerved to have of the ſaid *Dorothy*, other ten pounds of like lawful money, to wit, at Taunton aforeſaid, whereof the ſaid *Dorothy*, then and there had notice; *And whereas* alſo the ſaid *Dorothy*, whilſt ſhe was ſole, afterwards, to wit the day and year aforeſaid, at Taunton aforeſaid,, was indebted to the ſaid *William* in other ten pounds for work and labour, care and diligence, of the ſaid *William* as an apothecary, at the ſpecial inſtance and requeſt of the ſaid *Dorothy*, while ſole, before that time done, performed, and beſtowed, in and about the healing and curing the ſaid *Dorothy* of divers other diſeaſes and maladies under which ſhe had laboured and languiſhed, and for divers other medicines and plaiſters and neceſſary things before that found, provided, uſed, and applied, by the ſaid *William*, at the like inſtance and requeſt of the ſaid *Dorothy* while ſole, in that reſpect, and being ſo indebted, the ſaid *Dorothy* whilſt ſhe was ſole in conſideration thereof, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, undertook and then and there faithfully promiſed the ſaid *William* to pay him the ſaid ten pounds laſt

laſt mentioned, when ſhe the ſaid *Dorothy* ſhould be thereto afterwards requeſted; *And whereas* alſo, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, in conſideration that the ſaid *William* had before that time done, performed, and beſtowed other work, labour, care, and diligence as an apothecary for the ſaid *Dorothy*, whilſt ſhe was ſole, at her ſpecial inſtance and requeſt, in and about the healing and curing of the ſaid *Dorothy*, of divers other diſeaſes and maladies, under which ſhe had laboured and languiſhed, and had in that reſpect at the like inſtance and requeſt of the ſaid *Dorothy*, found, provided, uſed, and applied, divers other medicines, plaiſters, and other neceſſary things, ſhe the ſaid *Dorothy*, whilſt ſhe was ſole, undertook, and then and there faithfully promiſed the ſaid *William* to pay him as much money as he therefore reaſonably deſerved to have, when ſhe the ſaid *Dorothy* ſhould be thereto afterwards required, *and* the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Dorothy*, other ten pounds of like lawful money, to wit, at Taunton aforeſaid, whereof the ſaid *Dorothy* then and there had notice; *And whereas alſo* the ſaid *Dorothy*, whilſt ſhe was ſole, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, was indebted to the ſaid *William*, in other ten pounds of like money, for divers goods, wares, and merchandizes, by the ſaid *William*, before that time ſold and delivered to the ſaid *Dorothy*, whilſt ſhe was ſole, at her ſpecial inſtance and requeſt, and being ſo indebted the ſaid *Dorothy*, whilſt ſhe was ſole, in conſideration thereof, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid laſt mentioned ſum of money, when ſhe the ſaid *Dorothy* ſhould be thereto afterwards requeſted; *And whereas alſo*, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, in conſideration that the ſaid *William* had, before that time, ſold, and delivered to the ſaid *Dorothy*, while ſhe was ſole, and at her like inſtance and requeſt, divers other goods, wares, and merchandizes, ſhe the ſaid *Dorothy*, while ſhe was

ſole, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him as much money as he therefore reaſonably deſerved to have, and the ſaid *William* avers, that he therefore reaſonably deſerved to have of the ſaid *Dorothy*, while ſhe was ſole, other ten pounds, of like lawful money, to wit, at Taunton aforeſaid, whereof the ſaid *Dorothy*, then and there had notice. *And whereas* alſo the ſaid *Dorothy*, whilſt ſhe was ſole, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, was indebted to the ſaid *William*, in other ten pounds of like lawful money, for money, by the ſaid *William*, before that time paid, laid out, and expended, for the ſaid *Dorothy*, whilſt ſhe was ſole, and at her ſpecial inſtance and requeſt, and being ſo indebted, the ſaid *Dorothy*, whilſt ſhe was ſole, in conſideration thereof, afterwards, to wit, the day and year aforeſaid, at Taunton aforeſaid, undertook, and then and there faithfully promiſed the ſaid *William*, to pay him the ſaid laſt mentioned ſum of money, when ſhe, the ſaid *Dorothy*, ſhould be thereunto afterwards requeſted; *Yet* the ſaid *Dorothy*, while ſhe was ſole, and the ſaid *Benjamin* and *Dorothy*, after the marriage celebrated between them, not regarding the ſaid ſeveral promiſes and undertakings of the ſaid *Dorothy*, ſo made as aforeſaid, but contriving and fraudulently intending, craftily and ſubtlely to deceive and defraud the ſaid *William*, in this particular, have not, nor hath either of them yet paid the ſaid ſeveral ſums of money, or any part thereof, to the ſaid *William*, although ſo to do, ſhe the ſaid *Dorothy*, afterwards, whilſt ſhe was ſole, oftentimes, and the ſaid *Benjamin* and *Dorothy*, ſince their marriage, to wit, on the firſt day of January, in the year of our Lord, one thouſand ſeven hundred and ſeventy-two, and often afterwards, at Taunton aforeſaid, by the ſaid *William*, were requeſted; but they to pay the ſame to him, have, and each of them hath hitherto wholly refuſed, and ſtill do refuſe, to the ſaid *William*, his damage of twenty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

O

On bail bond againſt the principal.

Saturday next, after the morrow of the holy Trinity, in Trinity term, in the fourteenth year of the reign of king George the Third.

Middleſex, to wit. } *William White*, gentleman, aſſignee of *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſheriff of the county of Middleſex, according to the form of the ſtatute in ſuch caſe made and provided, complains of *Benjmain Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, of a plea that he render to the ſaid *William*, thirty ſix pounds of lawful money of Great Britain, which he owes to, and unjuſty detains from him. For that *whereas* the ſaid *Benjamin*, after the firſt day of Trinity term, which was in the year of our Lord one thouſand ſeven hundred and ſix, to wit, on the thirteenth day of May, in the year of our Lord, one thouſand ſeven hundred and ſeventy-four, at Weſtminſter, in the county of Middleſex, was arreſted by the ſaid *Charles Jones* and *Richard Red*, then being ſheriff of the county of Middleſex, by virtue of a certain precept of our lord the now king, called a bill of Middleſex, before then, to wit, in Eaſter term, now laſt paſt, iſſued out of the court of our ſaid lord the now king, before the king himſelf, the ſaid court then, and ſtill being held at Weſtminſter, in the county of Middleſex, by which ſaid precept, our ſaid lord, the now king, commanded the ſaid then ſheriff, that he ſhould take the ſaid *Benjamin*, if he might be found in his bailiwick, and keep him ſafely, ſo that he might have his body before our ſaid lord the king, at Weſtminſter, on Monday next, after the morrow of the Aſcenſion, now laſt paſt, to anſwer unto the ſaid *William*, in a plea of treſpaſs, and alſo to a certain bill of the ſaid *William*, againſt the ſaid *Benjamin*, for thirty-ſix pounds, upon promiſes, according to the cuſtom of the court of our lord the king, before the king himſelf, to be exhibited, and that the ſaid ſheriff ſhould then have there that precept, which ſaid precept, before the ſaid arreſt, was

duly marked or indorſed for bail for eighteen pounds, by virtue of an affidavit, before then duly made and filed in the ſaid court of our ſaid lord the king, before the king himſelf, of the cauſe of action of the ſaid *William*, againſt the ſaid *Benjamin*, in that behalf. *And whereas* the ſaid *Charles Jones*, and *Richard Red*, ſo being ſheriff of Middleſex, as aforeſaid, of and upon that arreſt took bail for the appearance of the ſaid *Benjamin*, at the return of the ſaid precept, according to the exigence of the ſaid precept, and upon that occaſion the ſaid *Benjamin*, afterwards to wit, on the ſaid thirteenth day of May, in the year of our Lord, one thouſand, ſeven hundred, and ſeventy-four, aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, by his certain writing, obligatory, commonly called a bail bond, ſealed with his ſeal, and to the court of our lord the king, now here ſhewn the date whereof is the ſame day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the ſaid *Charles*, and *Richard*, then being ſheriff of the ſaid county of Middleſex, by the name of *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſheriff of the county of Middleſex, in the ſum of thirty-ſix pounds, of good and lawful money of Great-Britain, to be paid to the ſaid ſheriff, or his aſſigns, when he the ſaid *Benjamin*, ſhould be thereto afterwards requeſted, with a condition to the ſaid writing, obligatory ſubſcribed, that if the ſaid *Benjamin* did appear before our ſaid lord the king, at Weſtminſter, on Monday next, after the morrow of the Aſcenſion, aforeſaid, to anſwer unto the ſaid *William*, in a plea of treſpaſs, and alſo, to a bill of the ſaid *William*, againſt the ſaid *Benjamin*, for thirty-ſix pounds, upon promiſes according, &c. to be exhibited, that then, the preſent obligation ſhould be void, and of no force, otherwiſe to ſtand and remain in full force, vigour and effect, as by the ſaid writing obligatory, and the ſaid condition thereof, relation being thereto had, may more fully and at large appear; *and whereas* the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſo being ſheriff of the county of Middleſex, and as aforeſaid, afterwards to wit, on the third day of June,

June, in the year our Lord, one thouſand, ſeven hundred, and ſeventy-four, at Weſtminſter aforeſaid, in the ſaid county of Middleſex, at the requeſt, coſts and charges of the *William*, the plaintiff in the ſaid ſuit, aſſigned the ſaid writing obligatory to the ſaid *William*, by then and there indorſing that aſſignment, on the back of the ſaid writing obligatory, and atteſting the ſame, under his hand and ſeal of office, of ſheriff of the ſaid county of Middleſex, in the preſence of two credible witneſſes, according to the form of the ſtatute, in ſuch caſe made and provided, as by the ſaid aſſignment, indorſed on the ſaid writing obligatory, and duly ſtampt before the exhibiting the bill of the ſaid *William*, according to the form of the ſtatute in ſuch caſe made and provided, and to the court of our ſaid lord the king, before the king himſelf, now here ſhewn, the date whereof, is the ſame day and year laſt aforeſaid, relation being thereto had may more fully appear; *and* the ſaid *William*, in fact ſays, that the ſaid *Benjamin*, did not appear before our ſaid lord the king, at Weſtm nſter, on the ſaid Monday, next after the morrow of the Aſcenſion, in the ſaid condition mentioned, according to the form and effect of the ſaid condition, whereby the ſaid writing obligatory, became forfeited, and whereby, and by force of the ſtatute in ſuch caſe made and provided, an action hath accrued to the ſaid *William*, to demand, and have of and from the ſaid *Benjamin* the ſaid thirty-ſix pounds above demended, yet the ſaid *Benjamin*, altho' often requeſted, hath not paid the ſaid thirty-ſix pouds, or any part thereof, to the ſaid *Charles Jones*, and *Richard Red*, or either of them, before the ſaid aſſignment, or to the ſaid *William*, aſſignee, as aforeſaid, ſince the ſaid aſſignment, or to any of them, but he to pay the ſame, or any part thereof to them, or any of them, hath hitherto wholly refuſed, and to pay the ſame to the ſaid *William*, ſtill refuſes to the ſaid *William*, to his damage of ten pounds. And therefore he bring ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. *(Dibt.)* } Pledges to proſecute { *John Doe*, and *Richard Roe.*

Saturday

On bail bond againſt one of the bail.

Saturday next, after the morrow of the holy Trinity, in Trinity term, in the fourteenth year of the reign of king George the Third.

Middleſex, to wit. } *William White*, gentleman, aſſignee of *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſheriff of the county of Middleſex, according to the form of the ſtatute, in ſuch caſe made and provided, complains of *Jonathan Black*, being in the cuſtody of the marſhal of the marſhalſea, of our lord the king, before the king himſelf, of a plea, that he render to him thirty-ſix pounds of lawful money of Great Britain, which he owes to and unjuſtly detains from him; that *whereas*, one *Benjamin Black* after the firſt day of Trinity term, which was in the year of our Lord, one thouſand, ſeven hundred, and ſix, to wit, on the thirteenth day of May, in the year of our Lord, one thouſand, ſeven hundred, and ſeventy-four, at Weſtminſter, in the county of Middleſex, was arreſted by the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, then and ſtill being ſheriff of the ſaid county, by virtue of a certain precept of our ſaid lord the now king, called a bill of Middleſex before, then to wit, in Eaſter term, now laſt paſt, iſſued out of the court of our ſaid lord the now king, before the king himſelf, the ſaid court then and ſtill being held at Weſtminſter, in the county of Middleſex, aforeſaid, by which ſaid precept, the ſaid lord the now king, commanded the ſaid then and now ſheriff of the ſaid county of Middleſex, that he ſhould take the ſaid *Benjamin*, if he might be found in his bailiwick, and keep him ſafely, ſo that he might have his body before our ſaid lord the king, at Weſtminſter, on Monday next after the morrow of the Aſcenſion now laſt paſt, to anſwer to the ſaid *William* of a plea of treſpaſs, and alſo to anſwer to a bill of the ſaid *William*, againſt the ſaid *Benjamin*, for thirty-ſix pounds, upon promiſes, according to the cuſtom of the court of our lord the king, before the king himſelf, to be exhibited, and that the ſaid ſheriff ſhould then have there that precept, which ſaid precept before

the

the ſaid arreſt was duly marked or indorſed for bail, for eighteen pounds, by virtue of an affidavit, before then duly made and filed in the ſaid court of our ſaid lord the king, before the king himſelf, of the cauſe of action of the ſaid *William*, againſt the ſaid *Benjamin*, in that behalf; *And whereas* the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſo being ſheriff of the ſaid county of Middleſex, aforeſaid, of and upon that arreſt, took bail for the appearance of the ſaid *Benjamin* at the return of the ſaid precept, according to the exigence of the ſaid precept, and upon that occaſion the ſaid *Jonathan*, as bail or ſurety for the ſaid *Benjamin*, afterwards, to wit, on the ſaid thirteenth day of May, in the year of our Lord, one thouſand ſeven hundred and ſeventy-four, at Weſtminſter aforeſaid, in the county aforeſaid, by his certain writing obligatory, called a bail bond, ſealed with his ſeal, and to the court of our ſaid lord the king, before the king himſelf, now here ſhewn, the date whereof is the ſame day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, then being ſheriff of the ſaid county of Middleſex, by the name and deſcription of *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſheriff of the county of Middleſex, in the ſaid ſum of thirty-ſix pounds, of good and lawful money of Great Britain, to be paid to the ſaid ſheriff or his aſſignee, when he the ſaid *Jonathan* ſhould be thereto afterwards requeſted, with a condition to the ſaid writing obligatory, ſubſcribed, that of the ſaid *Benjamin*, did appear before our ſaid lord the king, at Weſtminſter, on the ſaid Monday next after the morrow of the Aſcenſion, to anſwer the ſaid *William* in a plea of treſpaſs, and alſo to a bill of the ſaid *William*, againſt the ſaid *Benjamin*, for thirty-ſix pounds, upon promiſes, according, &c. to be exhibited, that then, that their preſent obligation to be void, and of no force, otherwiſe to ſtand and remain in full force, vigour, and effect, as by the ſaid writing obligatory, and the ſaid condition thereof, relation being thereto had, may more fully and at large appear. *And whereas* the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, ſo being ſheriff of the ſaid county aforeſaid, afterwards,

wards, to wit, on the third day of June, in the year of our Lord, one thouſand ſeven hundred and ſeventy-four, aforeſaid, at Weſtminſter aforeſaid, in the county aforeſaid, at the requeſt and charges of the ſaid *William*, the plaintiff, in the ſaid ſuit aſſigned, the ſaid writing obligatory, to the ſaid *William*, by then and there indorſing that aſſignment, on the back of the ſaid writing obligatory, and atteſting the ſame under his hand and ſeal, of office of ſheriff of the ſaid county of Middleſex, in the preſence of two creditable witneſſes, as by the ſaid aſſignment indorſed on the ſaid writing obligatory and duly ſtampt, before the exhibiting of the bill of the ſaid *William*, according to the form of the ſtatute in ſuch caſe made provided, and to the court of our ſaid lord the king, before the king himſelf, now here ſhewn, the date whereof is the ſame day and year aforeſaid, relation being thereto had, more fully appear, and the ſaid *William* in fact ſays, that the ſaid *Benjamin* did not appear before our ſaid lord the king, on the ſaid Monday next after the morrow of the Aſcenſion, in the ſaid condition mentioned, according to the form and effect of the ſaid condition, whereby the ſaid writing obligatory became forfeited, whereby, and by force of the ſtatute in ſuch caſe made and provided, an action hath accrued to the ſaid *William*, to demand and have, of and from, the ſaid *Jonathan*, the ſaid thirty-ſix pounds above demanded, *yet* the ſaid *Jonathan*, although often requeſted, hath not yet paid the ſaid thirty-ſix pounds, or any part thereof to the ſaid *Charles Jones*, Eſquire, and *Richard Red*, Eſquire, or either of them, before the ſaid aſſignment, or to the ſaid *William*, aſſignee as aforeſaid, ſince the ſaid aſſignment, or to any of them, but he to pay the ſame, or any part thereof to them, or any of them, hath hitherto wholly refuſed, and ſtill refuſes to pay the ſame to the ſaid *William* his damage of ten pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſeute, { *John Doe*, and *Richard Roe*.

(*Debt.*)

In

In treſpaſs and aſſault.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black* being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, for that the ſaid *Benjamin*, on the firſt day of January, in the year of our Lord, one thouſand ſeven hundred and eighty-three, with force and arms, to wit, with ſwords, ſtaves, and ſticks, broke and entered the meſſuage or dwelling houſe of the ſaid *William*, ſituate, ſtanding, and being in the pariſh of Saint Margaret, being within the liberty of Weſtminſter, in the county of Middleſex aforeſaid, the doors thereof being then and there ſhut, locked, and faſtened; and then and there made a great noiſe, diſturbance, and affray, in the ſaid houſe, and kept and continued in the ſaid houſe, making and continuing ſuch his noiſe, diſturbance, and affray therein for a long time, to wit, for the ſpace of twelve hours then next following, and thereby then and there greatly diſturbed and diſquieted the ſaid *William*, in the peaceable and quiet poſſeſſion, uſe, occupation, and enjoyment of his ſaid houſe: and then and there broke to pieces, ſpoiled, and deſtroyed, the doors, to wit, ſix doors of the ſaid *William*, of a large value, to wit, of the value of ten pounds, then and there affixed to the ſaid houſe; and the locks, to wit, ſix locks of the ſaid *William*, of a large value, to wit, of the value of forty ſhillings, to the ſaid doors, then and there reſpectively affixed, and with which the ſaid doors were then and there reſpectively locked and faſtened; and then and there ſtaid and continued in the ſaid houſe for a long time, to wit, from thence until the day of exhibiting the bill of the ſaid *William*, and without the leave or licence, and againſt the will of the ſaid *William*, and then and there expelled, put out, and amoved the ſaid *William* from the poſſeſſion and occupation thereof for a long time, to wit, for and during all the time aforeſaid, and other

wrongs to the ſaid *William*, then and there did againſt the peace of our ſaid lord the king, &c. to the ſaid *William*, his damage of fifty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs vi et armis.)

Treſpaſs, aſſault, and falſe impriſonment.

Trinity term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our lord the king, before the king himſelf, for that the ſaid *Benjamin*, on the firſt day of April, in the year of our Lord one thouſand ſeven hundred and eighty-three, with force and arms, to wit, with ſwords, ſtaves, and ſticks, broke and enterered the ſhop and dwelling houſe of the ſaid *William*, in the pariſh of Saint Mary Matfelon, otherwiſe White Chapple, in the county of Middleſex aforeſaid, and there ſtaid and continued for a long time, to wit, for the ſpace of ſix hours then next following without the licence and conſent, and againſt the will of the ſaid *William*, and during all that time made a great noiſe, diſturbance, and affray therein and kept and continued ſuch noiſe, diſturbance and affray therein, for and during all that time and during all that time greatly diſturbed and diſquieted the ſaid *William* and his family, in the peaceable and quiet poſſeſſion, uſe, occupation and enjoyment of the ſaid houſe and ſhop, and then and there, in the ſaid houſe and ſhop, with force and arms aforeſaid made an aſſault upon the ſaid *William*, and beat, bruiſed, wounded and ill treated him, ſo that his life was thereby in great danger, and then and there impriſoned him and kept and detained him in priſon there, for a long ſpace of time, to wit, for the ſpace of twelve hours, then next following, without any reaſonable or probable

bable cauſe whatever, contrary to the laws and cuſtoms of this realm, and againſt the will of the ſaid *William*, by means whereof the ſaid *William* was, during all that time, rendered unable to tranſact, follow, or carry on his lawful trade and buſineſs there in his ſaid houſe and ſhop; *And alſo* for that the ſaid *Benjamin*, afterwards, to wit, on the ſame day and year aforeſaid, at the place aforeſaid, in the county aforeſaid, with force and arms, to wit, with ſwords, ſtaves, and ſticks, made another aſſault upon the ſaid *William*, and then and there beat, bruiſed, wounded, and ill treated him, ſo that his life was thereby in great danger, and then and there impriſoned him, and kept and detained him in priſon there, for a long time, to wit, for the ſpace of twelve hours then next following, without any reaſonable or probable cauſe, and other wrongs to the ſaid *William*, then and there did, to the great damage of the ſaid *William*, and againſt the peace of our ſaid lord the now king, *wherefore* the ſaid *William* ſaith that he is injured, and hath ſuſtained damage to the value of forty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe.*

(Treſpaſs vi et armis.)

In treſpaſs and aſſault for crim. con.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, to wit. } *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, for that *whereas* the ſaid *Benjamin*, on the firſt day June, in the year of our Lord, one thouſand ſeven hundred and eighty-two, at Weſtminſter, in the ſaid county of Middleſex, with force and arms, made an aſſault upon *Jane White*, then and ſtill the wife of the ſaid *William*, and ſeduced, raviſhed

viſhed, debauched, lay with, deflowered, and carnally knew the ſaid *Jane*, and took and led away the ſaid *Jane*, ſo being the wife of the ſaid *William*, from the ſaid *William*, and kept and detained the ſaid *Jane*, the wife of the ſaid *William*, from the ſaid *William*, for a long time, to wit, from the ſaid firſt day of June aforeſaid, until the exhibiting of the bill of the ſaid *William*, whereby the ſaid *William*, during all the time aforeſaid, there loſt, and was deprived of the benefit and ſervice, and the aid, fellowſhip, comfort, council, and aſſiſtance of his ſaid wife; and which he ought, during all that time, to have had and enjoyed with his ſaid wife: *And* alſo for that the ſaid *Benjamin* on the ſaid firſt day of June, in the year of our Lord, one thouſand ſeven hundred and eighty-two, aforeſaid, and on divers other days and times, between that day and the day of the exhibiting of the ſaid bill of the ſaid *William* at Weſtminſter aforeſaid, in the county of Middleſex, with force and arms, aſſaulted the ſaid *Jane*, then and ſtill being the wife of the ſaid *William*, and there beat, ſeduced, raviſhed, debauched, deflowered, lay with, and carnally knew her the ſaid *Jane*, and took, led, and carried away her the ſaid *Jane*, ſo being the wife of the ſaid *William*, together with the goods and chattels, following to wit, twenty caps, twenty ſhifts, twenty pair of ſtockings, twenty pair of ſhoes, twenty aprons, twenty petticoats, two pair of ſtays, twenty handkerchiefs, twenty pair of ruffles, twenty pair of ſhift ſleeves, twenty gowns, ſix hats, three cloaks, three mantles, three ſcarves, three bonnets, ten pair of ſheets, ten pair of pillowbiers, ſix table cloths, twenty napkins, twenty towels, and two hundred ounces of wrought plate of the ſaid *William*, of the value of two hundred pounds, then and there found; and kept, and detained the ſaid *Jane*, ſo being the wife of the ſaid *William*, from the ſaid *William*, for a long time, to wit, from thence until the exhibiting of the ſaid bill of the ſaid *William*, and converted and diſpoſed of the ſaid goods and chattels to his own uſe, whereby the ſaid *William*, during all the time aforeſaid, loſt and was deprived of the benefit and ſervice, and the aid, fellowſhip, comfort,

fort, council, and aſſiſtance of his ſaid wife; and which he ought, during all that time, to have had and enjoyed with his ſaid wife: *And* alſo for that the ſaid *Benjamin*, on the ſaid firſt day of June, in the year aforeſaid, with force and arms, aſſaulted the ſaid *Jane*, then and ſtill being the wife of the ſaid *William*, and took, led, and carried away the ſaid *Jane*, ſo being the wife of the ſaid *William*, and kept, and detained the ſaid *Jane*, ſo being the wife of the ſaid *William*, from the ſaid *William*, for a long time, to wit, from thence until the exhibiting of the bill of the ſaid *William*, whereby the ſaid *William*, during all that time, loſt, and was deprived of the ſervice, aid, fellowſhip, comfort, council, ſociety, and aſſiſtance of his ſaid wife; and which he, during all that time, ought to have had and enjoyed, and otherwiſe might and would have had and enjoyed with his ſaid wife, and other wrongs, then, and there did to the ſaid *William*, to great damage of the ſaid *William*, and againſt the peace of our lord the now king; wherefore he ſays he is injured, and hath damage to the value of two thouſand pounds. Therefore he brings ſuit, &c.

A. B. for the plaintiff.
C. D. for the defendant.
(Treſpaſs vi et armis.)
} Pledges to proſecute { *John Doe*, and *Richard Roe*.

On Non Proſs.

Michaelmas term, in the ſeventeenth year of the reign of king George the Third.

Middleſex, to wit. } *William White*, complains of *Benjamin Black*, being in the cuſtody of the marſhal of the marſhalſea, of our lord the king, before the king himſelf, of a plea, that he render to the ſaid *William* ten pounds of lawful money, of Great Britain, which he owes to and unjuſtly detains from him

him, for that *whereas* the ſaid *William*, heretofore to wit, in Eaſter term, in the ſixteenth year of the reign of our ſaid lord the now king, in the court of our ſaid lord the king, before the king himſelf, the ſaid court then and ſtill being held at Weſtminſter, in the county of Middleſex, by the conſideration and judgment of the ſaid court, recovered againſt the ſaid *Benjamin*, thirty-three ſhillings, and ſixpence for that the ſaid *Benjamin*, did not proſecute his bill, againſt the ſaid *William*, in a certain plea of treſpaſs, againſt the ſaid *William*, then lately brought in the ſaid court, at the ſuit of the ſaid *Benjamin* awarded to the ſaid *William*, and with his aſſent, according to the form of the ſtatute, in ſuch caſe made and provided, by the ſaid court, ordered for his coſts and charges, by him laid out, in and about his defence, in that behalf, whereof the ſaid *Benjamin*, hath been convicted, as by the record and proceeedings thereof, remaining in the ſaid court of our ſaid lord the king, before the king himſelf, at Weſtminſter, aforeſaid, may more fully and at large appear, which ſaid judgment ſtill remains in its full force, ſtrength, and effect, not reverſed, vacated, ſet aſide, made void, paid off, ſatisfied, cancelled or diſcharged, and the ſaid *William* hath not yet obtained any execution of the judgment, whereby an action hath accrued, to the ſaid *William*, to demand and have of, and from the ſaid *Benjamin*, the ſaid ſum of thirty-three ſhillings and ſix pence, parcel of the ſaid ſum of ten pounds, above demand. *And whereas* the ſaid *Benjamin*, on the firſt day of June, in the ſixteenth year, aforeſaid, at Weſtminſter, aforeſaid, in the county of Middleſex, aforeſaid, borrowed of the ſaid *William*, the ſum of eight pounds, ſix ſhillings, and ſixpence, reſidue of the ſaid ſum of ten pounds, to be paid to the ſaid *William*, whenever he the ſaid *Benjamin*, ſhould be thereto afterwards requeſted, yet he the ſaid *Benjamin*, although often requeſted, hath not yet paid the ſaid ſum of ten pounds, or any part thereof, to the ſaid *William*, but he to pay the ſame to the ſaid *William*, hath hitherto wholly refuſed, and ſtill refuſes to the

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ſaid *William*, his damage of ten pounds. Therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. (*Def.*) } Pledges to proſecute { *John Doe*, and *Richard Roe*.

For words ſpoken againſt a woman.

Hilary term, in the twenty-third year of the reign of king George the Third.

London, to wit. } *Mary White* complains of *John Black* being in the cuſtody of the marſhal of the Marſhalſes of our ſovereign lord the king that now is, before the king himſelf, for that *whereas* the ſaid *Mary* is a good, true, faithful, and honeſt ſubject, of this kingdom, and as ſuch a good, true, faithful, and honeſt ſubject, hath always carried, governed, and behaved herſelf, and hath always been taken, held, and reputed by all her friends, neighbours, employers, dealers, and correſpondents, and other good and worthy ſubjects of this kingdom, to be a woman of good name, fame, credit, and reputation, and hath for all her life-time paſt hitherto, lived and continued free, and wholly unſuſpected, of and from all manner of theft, robbery, fraud, deceit, falſehood, and whoredom, and every ſuch hurtful crimes; *And whereas* the ſaid *Mary* now doth, and for divers years laſt paſt, hath lived by her care, labour, and induſtry, without any whoredom, theft, robbery, falſity, fraud, or deceit, by means whereof the ſaid *Mary* not only deſervedly obtained and acquired to herſelf the benevolence, good opinion, and credit, of all her dealers, friends, and employers, and other worthy ſubjects of this kingdom, with whom ſhe hath been concerned, but alſo gained and acquired ſundry great gains and profits, in her employment and buſineſs and aforeſaid, the comfortable ſupport of herſelf, and to the great increaſe

increaſe of her riches; *nevertheleſs* the ſaid *John* being not ignorant of the matters aforeſaid, but greatly envying the happy ſtate and condition of the ſaid *Mary*, and contriving, and maliciouſly intending to hurt, degrade, and injure the name, fame, eſtate, and reputation of her the ſaid *Mary*, in her employ and buſineſs aforeſaid, and to bring her into the miſtruſt of the ſubjects of this kingdom, and into the ſcandal, diſgrace, infamy, and danger of loſing her goods and chattels, lands and tenements, and alſo the loſs of her life by the laws of of this kingdom againſt ſuch ſort of malefactors, and to make his majeſty's ſubjects deſiſt from employing her, the ſaid *Mary*, or in any other manner dealing with or employing the ſaid *Mary*, in her buſineſs and employ aforeſaid, or otherwiſe, and that they ſhould deem her guilty of theft, robbery, fraud, deceit, and whoredom, and to bring her the ſaid *Mary* into the ſuſpicion thereof, on the twenty-fourth day of June, in the year of our Lord one thouſand ſeven hundred and eighty two, at London aforeſaid, in the pariſh of Saint Mary le Bow, in the ward of Cheap, theſe falſe, feigned, wicked, ſcandalous, and opprobrious words, of and concerning the ſaid *Mary*, in the preſence and hearing of ſeveral of the ſubjects of our lord the now king, then and there being, did falſely and maliciouſly ſpeak, pronounce, and with a loud voice publiſh, to wit, you (meaning the ſaid *Mary*) ſtole a watch; and the ſaid *John*, out of his further malice againſt the ſaid *Mary*, and falſely, maliciouſly, and wickedly contriving, and intending, to bring the ſaid *Mary*, into further ſuſpicion and ſcandal of the ſaid crimes of theft, robbery, fraud, and deceit, and to bring the ſaid *Mary* into further danger, and loſs of her good name, fame, credit, and reputation, as being guilty of theft, robbery, fraud, and deceit, and into the ſuſpicion and ſcandal of all her employers, and correſpondents, and the danger and forfeiture of her goods and chattels, lands, and tenements, and alſo the loſs of her life, afterwards, to wit, on the ſame twenty fourth day of June, in the ſaid year of our Lord one thouſand ſeven hundred and eighty-two,

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at London aforeſaid, to wit, in the pariſh and ward aforeſaid, theſe other falſe, feigned, ſcandalous, and opprobrious words, of and concerning the ſaid *Mary*, in the preſence and hearing of ſeveral of the ſubjects of our ſaid ſovereign lord the now king, did falſely, maliciouſly, and wickedly ſpeak, pronounce, and with a loud voice publiſh, to wit, you, (meaning the ſaid *Mary*) are a thief, and ſtole the watch, (meaning a watch that the ſaid *John*, pretended to have loſt); and the ſaid *John*, out of his further malice againſt the ſaid *Mary*, falſely and maliciouſly, and wickedly contriving, and intending to bring the ſaid *Mary* into the ſuſpicion and ſcandal of the ſaid crimes of theft, robbery, fraud, and deceit, and to bring the ſaid *Mary* into further danger, and loſs of her good name, fame, credit, and reputation, as being guilty of theft, robbery, fraud, and deceit, and into the ſuſpicion and ſcandal of all her employers and correſpondents, and the danger and forfeiture of her goods and chattels, lands and tenements, and alſo the loſs of her life, afterwards, to wit, on the ſame twenty-fourth day of June, in the ſaid year of our Lord one thouſand ſeven hundred and eighty-two, at London aforeſaid, in the pariſh and ward aforeſaid, theſe other falſe, feigned, wicked, ſcandalous, and opprobrious words, of and concerning the ſaid *Mary*, in the preſence and hearing of ſeveral of the ſubjects of our ſaid ſovereign lord the now king, did falſely, maliciouſly, and wickedly, ſpeak, pronounce, and with a loud voice publiſh, to wit, who ſtole the watch? (meaning that the ſaid *Mary* had been guilty of ſtealing a watch): *And* the ſaid *John*, out of his further malice againſt the ſaid *Mary*, and falſely, maliciouſly, and wickedly contriving and intending to bring the ſaid *Mary* into further ſuſpicion and ſcandal of the ſaid crimes of theft, robbery, fraud and deceit and the ſuſpicion and ſcandal of all her employers and correſpondents, and the danger and forfeiture of her goods and chattels, lands and tenements, and alſo the loſs of her life, afterwards, to wit, on the ſame twenty-fourth day of June, in the year of our Lord one thouſand ſeven hundred and eighty-two, at London aforeſaid,

in the parish and ward aforesaid, these other false, feigned, wicked, scandalous, and opprobrious words, of and concerning the said *Mary* in the presence and hearing of several of the subjects of our said sovereign lord the now king, did falsely, maliciously, and wickedly, speak, pronounce, and with a loud voice publish, to wit, she (meaning the said *Mary*,) stole a watch, (meaning a silver watch that the said *John* pretended he had lost); *And* the said *John*, out of his further malice against the said *Mary*, and falsely, maliciously, and wickedly contriving, and intending, to bring the said *Mary* into further suspicion and scandal of the said crimes of theft, robbery, fraud, and deceit, and to bring the said *Mary* into further danger, and loss of her good name, fame, credit, and reputation, as being guilty of theft, robbery, fraud, and deceit, and into the suspicion and scandal of all her employers and correspondents, and the danger and forfeiture of her goods and chattels, lands and tenements, and also the loss of her life, afterwards to wit, on the same twenty-fourth day of June, in the said year of our Lord, one thousand seven hundred and eighty-two, at London aforesaid, in the parish and ward aforesaid, these other false, feigned, wicked, scandalous, and opprobrious words, of and concerning the said *Mary*, in the presence and hearing of several of the subjects of our said sovereign lord the now king, did falsely, maliciously, and wickedly, speak, pronounce, and with a loud voice publish, to wit, you, (meaning the said *Mary*) are a thief, and was privy to the stealing the watch, (meaning a silver watch the said *John*, pretended to have lost); *And* the said *John*, out of his further malice against the said *Mary*, and falsely, maliciously, and wickedly contriving, and intending, to bring the said *Mary* into further suspicion and scandal of the said crimes of whoredom, theft, robbery, fraud, and deceit, and to bring the said *Mary* into further danger and loss of her good name, fame, credit, and reputation, as being guilty of theft, robbery, whoredom, fraud, and deceit, and into the suspicion and scandal of all her employers and correspondents, and the danger and forfeiture of her goods and chattels, lands and tenements

ments, and alſo the loſs of her life, afterwards, to wit, on the ſame twenty-fourth day of June, in the ſaid year of our Lord, one thouſand ſeven hundred and eighty-two, at London aforeſaid, in the pariſh and ward aforeſaid, theſe other falſe, feigned, wicked, ſcandalous, and opprobrious words, of and concerning the ſaid *Mary*, in the preſence and hearing of ſeveral of the ſubjects of our ſaid ſovereign lord the now king, did falſely, maliciouſly, and wickedly, ſpeak, pronounce, and with a loud voice publiſh, to wit, you (meaning the ſaid *Mary*) keep a bawdy-houſe, and harbour nothing but whores and rogues in your houſe, (meaning that the ſaid *Mary* kept a houſe to entertain looſe and diſorderly perſons); by means of ſpeaking and publiſhing of which ſaid ſeveral falſe, feigned, wicked, ſcandalous, and opprobrious words, of and concerning the ſaid *Mary*, ſhe is not only greatly hurt and ſcandalized in her good name, fame, credit, and reputation, in which ſhe then lived, but divers of her employers, and correſpondents, and other the ſubjects of our lord the now king, giving heed and credit to the ſaid ſeveral falſe, feigned, wicked, ſcandalous, and opprobrious words, have held the ſaid *Mary* in great diſeſteem and abhorrence, and have deſiſted and refuſed to employ her, and ſhunned all converſation and dealings with her, and the ſaid *Mary* thereby is brought into great diſhonour, ſhame, and diſeſteem, and the ſaid *Mary* hath been obliged to lay out and expend divers ſums of money to manifeſt her innocence; wherefore the ſaid *Mary* ſaith, that ſhe is injured, and hath ſuſtained damage to the value of two hundred pounds. And therefore ſhe brings ſuit, &c.

A. B. for the plaintiff. *C. D.* for the defendant. } Pledges to proſecute { *John Doe*, and *Richard Roe*.

(Treſpaſs on the Caſe.)

For practiſing as an Attorney, without being admitted.

Wedneſday next, after the morrow of Saint Martin, Trinity term, in the eleventh year of the reign of king George the Third.

Glouceſterſhire, to wit. } *William White* complains of *Benjamin Black* being in the cuſtody of the marſhal of the Marſhalſea, of our lord the now king, before the king himſelf, in a plea, that he render unto the ſaid *William*, two hundred and fifty pounds of lawful money of Great Britain, which he owes to and unjuſtly detains from him, for that the ſaid *Benjamin* not regarding the ſtatute in ſuch caſe made and provided, nor fearing the penalty therein contained, after the making of a certain act of parliament made at Weſtminſter, in the ſecond year of the reign of our late ſovereign lord George the Second, late king of Great Britain, and intituled, an act for the better regulation of attornies, and ſolicitors, and after the firſt day of December, in the year of our Lord, one thouſand ſeven hundred and thirty, mentioned in that act, and during the continuance of that act, and before the exhibiting of the bill of the ſaid *William*, to wit, on the ſecond day of November, in the eleventh year of the reign of our lord the now king, at Winterbourne, in the ſaid county of Glouceſter, did unlawfully in his own name, act as a ſolicitor, in his majeſty's court of chancery, the ſaid court of chancery then being held at Weſtminſter, in the county of Middleſex, in a certain cauſe or ſuit then depending in that court, between *John Back* complainant, and *Mary Banks*, *Charles Banks*, and *Robert Banks*, defendants, in proſecuting and carrying on the ſaid cauſe or ſuit on the part and behalf of the ſaid *John Black*, and as his ſolicitor in that cauſe, for and in expectation of gain, fee and reward, to be therefore payable and paid to him, he the ſaid *Benjamin*, not being then, nor having been at any time before then admitted and inrolled an attorney of any of the courts of law, or ſolicitor of any of the courts of equity, mentioned in the ſaid act, according to the directions

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of that act, and as required by that act, againſt the form of the ſtatute in ſuch caſe made and provided, whereby and by force of the ſaid act, the ſaid *Benjamin* forfeited for his ſaid offence, fifty pounds, and whereby, and by force of the ſaid act, an action hath accrued unto the ſaid *William*, to demand and have of the ſaid *Benjamin* fifty pounds ſo forfeited as aforeſaid, parcel of the ſaid two hundred and fifty pounds above demanded; *And* the ſaid *William* further ſays that the ſaid *Benjamin* not regarding the ſtatutes in ſuch caſe made and provided, nor fearing the penalties therein contained, after the making of the aforeſaid act of parliament, of the ſaid ſecond year of the reign of our ſaid late lord George the Second, late king of Great Britain, and during the continuance of the ſaid act, and after the ſaid firſt day of December, in the year of our Lord one thouſand ſeven hundred and thirty, mentioned in that act, and during the continuance of that act, and before the exhibiting of the bill of the ſaid *William*, to wit, on the ſecond day of November, in the eleventh year of the reign of our ſaid lord the now king, at Winterbourne aforeſaid, in the ſaid county of Glouceſter, did unlawfully in the name of *Edward Evans*, Eſquire, act as a ſolicitor in his majeſty's ſaid court of chancery, the ſaid court of chancery then being held at Weſtminſter in the ſaid county of Middleſex, in a certain other cauſe or ſuit then depending in that court, between the ſaid *John Black* complainant, and *Mary Banks*, *Charles Banks*, and *Robert Banks*, defendants, in proſecuting and carrying on the ſaid laſt mentioned cauſe or ſuit, on the part and behalf of the ſaid *John Black*, and as his ſolicitor in that laſt mentioned cauſe, for and in expectation of gain, fee, and reward, to be therefore payable, and paid to him he the ſaid *Benjamin*, not being then nor having been at any time before then admitted and inrolled an attorney of law, or a ſolicitor of any of the courts of equity, mentioned in the ſaid act, according to the directions of the ſaid act, and as by that act required againſt the form of the ſaid act, in ſuch caſes made and provided, whereby, and by force of the ſaid act, the ſaid

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Benjami ited by his ſaid laſt mentioned offence other fifty pounds, and whereby, and by force of the ſaid act, an action hath accrued unto the ſaid *William*, to demand, and have of the ſaid *Benjamin*, the ſaid laſt mentioned fifty pounds, forfeited, as laſt aforeſaid, other parcel of the ſaid two hundred and fifty pounds, above demanded; *and* the ſaid *William*, further ſays, that the ſaid *Benjamin*, not regarding the ſtatute in ſuch caſe made and provided, nor fearing the penalties therein contained, after the making of the aforeſaid act of parliament, of the ſecond year of the reign of our ſaid late lord George the Second, late king of Great Britain; and after the firſt day of December, in the year of our Lord, one thouſand, ſeven hundred and thirty, mentioned in that act, and during the continuance of that act, held before the exhibiting of the ſaid bill, of the ſaid *William*, to wit, on the twenty-ſixth day of October, in the eleventh year of the reign of our lord the now king, to wit, at Winterbourne, aforeſaid, in the ſaid county of Glouceſter, did unlawfully in his own name, ſue, and proſecute out of his majeſty's court of chancery, the ſaid court of chancery then being held at Weſtminſter, in the county of Middleſex, a certain writ of our ſaid lord the now king, called a *recordari facias loquelam*, directed to the then ſheriff of the ſaid county of Glouceſter, for his recording of a certain plaint, then depending in the ſaid then ſheriffs county court, between the ſaid *William White*, plaintiff, and one *Bartholomew Brown*, defendant, in a plea of taking and unjuſtly detaining of the cattle of the ſaid *William*, and the ſaid ſheriffs having that record before his majeſty's juſtices, at Weſtminſter, in fifteen days of Saint Martin, then next following, on the part and behalf of the ſaid *Bartholomew*, and as his attorney for, and in expectation of gain, fee and reward, to be therefore payable and paid to him the ſaid *Benjamin*, he the ſaid *Benjamin*, not being then, nor having been at any time before then admitted and inrolled an attorney of any of the courts of law, or a ſolicitor of any of the courts of equity, mentioned in

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the ſaid act, according to the directions of that act, and as required by that act, againſt the form of the ſtatute in ſuch caſe made and provided, whereby, and by force of the ſaid act, the ſaid *Benjamin*, forfeited for his ſaid laſt mentioned offence other fifty pounds, and whereby and by force of the ſaid act, an action hath accrued unto the ſaid *William*, to demand and have of the ſaid *Benjamin*, the ſaid fifty pounds, ſo forfeited, as laſt aforeſaid, other parcel of the ſaid two hundred and fifty pounds, above demanded, and the ſaid *William*, further ſays, that the ſaid *Benjamin* not regarding the ſaid ſtatute in ſuch caſe made and provided, nor fearing the penalties therein contained, after the making of the aforeſaid act of parliament, of the ſecond year of the reign of our ſaid late lord George the Second, late king of Great Britain; and during the continuance of the ſaid act of parliament, and after the firſt day of December, in the year of our Lord, one thouſand, ſeven hundred and thirty, mentioned in that act, and during the continuance of that act, and before the exhibiting of the bill of the ſaid *William*, to wit, on the twenty-ſixth day of October, in the eleventh year of the reign of our ſaid lord the king, to wit, at Wniterbourne, aforeſaid, in the ſaid county of Glouceſter, did unlawfully ſue, and proſecute out of his majeſty's court of chancery, the ſaid court of chancery, then being held at Weſtminſter, in the ſaid county of Middleſex, a certain other writ of our ſaid lord the now king, called a *recordari facias loquelam*, directed to the then ſheriff of the ſaid county of Glouceſter, for his the ſaid then ſheriff's cauſing to be recorded in his full county, a certain plaint, then depending in the ſaid then ſheriff's county court, of the ſaid county, between the ſaid *William White*, plaintiff, and the ſaid *Bartholomew Brown*, defendant, in a plea of taking and unjuſtly detaining of the cattle of the ſaid *William*, and for the ſaid then ſheriffs having that record before his now majeſty's juſtices, at Weſtminſter, in fifteen days, of Saint Martin, then next following, on the part and behalf of the ſaid *Bartholomew*, and as his attorney, in that laſt mentioned cauſe, for and in expectation

expectation of gain, fee, and reward, to be therefore payable and paid to him, the ſaid *Benjamin*, he the ſaid *Benjamin*, not being then, nor having been at any time before then, admitted and inrolled an attorney of any of the courts of law, or a ſolicitor of any of the courts of equity, mentioned in the ſaid act, according to the directions of the ſaid act, and as by that act was required, againſt the form of the ſtatute, in ſuch caſe made and provided, whereby, and by force of the ſaid act, the ſaid *Benjamin*, forfeited for his ſaid laſt mentioned offence, other fifty pounds, and whereby, and by force of the ſaid act, an action hath accrued to the ſaid *William*, to demand and have of the ſaid *Benjamin*, the ſaid fifty pounds, ſo forfeited, as laſt aforeſaid, other parcel of the ſaid ſum of two hundred and fifty pounds, above demanded, and the ſaid *William*, further ſaith, that the ſaid *Benjamin*, not regarding the ſtatutes, in ſuch caſe made and provided, nor in the leaſt fearing the penalties therein contained, after the making of the aforeſaid act of parliament, of the ſaid ſecond year of the ſaid late king George the Second, and during the continuance of that act, and after the making of a certain other act of parliament, made at Weſtminſter aforeſaid, in the twelfth year of the reign of the ſaid late king George the Second, intituled, an act for continuing the act made in the eighth year of the reign of her late majeſty queen Ann, to regulate the price and aſſize of bread, and for continuing, explaining and amending the act made in the ſecond year of the reign of his preſent majeſty, for the better regulation of attornies and ſolicitors, and after the twenty fourth day of June, in the year of our Lord one thouſand, ſeven hundred and thirty-nine, in the ſaid act of the ſaid twelfth year of the ſaid late king George the Second mentioned, and during the continuance of that laſt mentioned act, and before the exhibiting of the ſaid bill of the ſaid *William*, to wit, on the ſeventh day of November, in the eleventh year of the reign of our lord the now king at Glouceſter aforeſaid, in the ſaid county of Glouceſter, unlawfully and againſt the form and effect of the ſaid act of the ſaid twelfth year of the reign

reign of our ſaid late lord king George the Second, in the county court of the then ſheriff of the county of Glouceſter, there then held, did defend a certain action, then depending in the ſaid county court, at the ſuit of the ſaid *William*, againſt the ſaid *Bartholomew* in a plea of taking and unjuſtly detaining of the cattle of the ſaid *William*, by then and there entering an appearance for the ſaid *Bartholomew* at the ſuit of the ſaid *William*, in the ſaid county court, in the ſaid plea, for and as the attorney of the ſaid *Bartholomew* in that ſuit, in expectation of gain, fee, and reward, to be therefore payable, and paid to him the ſaid *Benjamin*; *And* the ſaid *William* further ſays, that the ſaid *Benjamin* was not, nor at any time before then had been admitted an attorney of any of the courts of law, or a ſolicitor of any of the courts of equity mentioned in the ſaid act of the ſecond year of the reign of the ſaid late king George the Second, according to the ſaid act ſo made in the ſaid ſecond year of the reign of the ſaid late king George the Second, againſt the form of the ſtatute ſo made in the ſaid twelfth year of the ſaid late king, whereby and by force of the ſaid laſt mentioned act, the ſaid *Benjamin* forfeited for his ſaid laſt mentioned offence the ſum of twenty-five pounds, whereby, by force of the ſaid laſt mentioned act, an action hath accrued unto the ſaid *William* to demand and have of the ſaid *Benjamin* the ſaid twenty-five pounds ſo forfeited as laſt aforeſaid, other parcel of the ſaid two hundred and fifty pounds above demanded; *and* the ſaid *William* further ſays, that the ſaid *Benjamin* not regarding the ſtatutes in ſuch caſe made and provided, nor in the leaſt fearing the penalties therein contained after the making of the ſaid two ſeveral acts of parliament abovementioned, and after the ſaid twenty-fourth day of June in the year of our Lord one thouſand ſeven hundred and thirty-nine, mentioned in the ſaid act of the ſaid twelfth year of the reign of the ſaid late king George the Second, and during the continuance of thoſe ſeveral acts of parliament, and before the exhibiting of the ſaid bill of the ſaid *William*, to wit, on the ſaid ſeventh day of November, in the eleventh year of the reign of our

lord the now king, at Glouceſter aforeſaid, in the ſaid county of Glouceſter, unlawfully and againſt the form and effect of the ſaid act of the ſaid twelfth year of the reign of our ſaid late lord king George the Second, in the county court of the then ſheriff of the county of Glouceſter, then and there held, did defend a certain action, then depending in the ſaid county court, at the ſuit of the ſaid *William* againſt the ſaid *Bartholomew* in a plea of taking and unjuſtly detaining of the cattle of the ſaid *William* at the ſuit of the ſaid *William* in the ſaid county court, in the ſaid plea for and in expectation of gain, fee, and reward, to be therefore payable and paid to him; *and* the ſaid *William* further ſays, that the ſaid *Benjamin*, was not, nor at any time before had been admitted an attorney of any of the courts of law, or a ſolicitor of any of the courts of equity, mentioned in the ſaid act of the ſecond year of the reign of the ſaid late king George the Second according to the ſaid act ſo made in the ſaid ſecond year of the reign of the ſaid late king George the Second, againſt the form of the act ſo made in the ſaid twelfth year of the reign of the ſaid late king, whereby and by force of the ſaid laſt mentioned act, the ſaid *Benjamin* forfeited for his ſaid laſt mentioned offence the ſum of other twenty-five pounds, whereby and by force of the ſaid laſt mentioned act, an action hath accrued unto the ſaid *William*, to demand and have of the ſaid *Benjamin* the ſaid twenty-five pounds ſo forfeited as laſt aforeſaid, reſidue of the ſaid two hundred and fifty pounds above demanded; yet the ſaid *Benjamin* (altho' often requeſted) hath not yet paid the ſaid ſum of two hundred and fifty pounds, or any part thereof, to the ſaid *William*, but, to pay the ſame to the ſaid *William* hath hitherto wholly refuſed, and ſtill refuſes, to the ſaid *William* his damage of twenty pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff,
C. D. for the defendant.
(Debt.)

} Pledges to proſecute { *John Doe*, and *Richard Roe*.

For

For an exceſſive diſtreſs.

Hilary term, in the twenty-third year of the reign of king George the Third.

Middleſex, } *William White* complains of *Benjamin Black*
to wit. } and *Richard Red*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, for that *whereas* by the laws and cuſtoms of this realm, no perſon or perſons whomſoever, ought to be diſtrained by his, her, or their goods or chattels, for any matter, cauſe, or thing whatſoever, but only by a reaſonable diſtreſs; *yet* the ſaid *Benjamin* and *Richard* well knowing the premiſes, but contriving, and wrongfully, unjuſtly, injuriouſly, and maliciouſly, intending to hurt, injure, harraſs, aggrieve, and oppreſs the ſaid *William*, by an exceſſive and unreaſonable diſtreſs, againſt the laws and cuſtoms of this realm, heretofore, to wit, on the firſt day of June, in the year of our Lord, one thouſand ſeven hundred and eighty-two, to wit, at the pariſh of Saint Leonard Shoreditch, in the county of Middleſex aforeſaid, exceſſively and unreaſonably took and diſtrained, and cauſed to be taken and diſtrained, divers goods and chattels, to wit, forty-eight candles, three mops, two ſhelves, forty boards, two coal meaſures, one broom, one braſs cock, one neſt of drawers, one hundred pounds weight of ſugar, fifty marbles, one hundred pounds weight of rice, eighty pounds weight of ſtarch, ſixty pounds weight of pepper, fifty pounds weight of ſtone blue, thirty pounds weight of muſtard, forty pounds weight of brimſtone, five hundred yards of thread, five hundred yards of tape, one thouſand needles, one hundred pounds weight of ſalt, fifty pencils, two nutmeg graters, twenty ivory knobs, ten pounds weight of bone duſt, ten quire of brown paper, one ſand bin, forty buſhels of ſand, one bruſh, one bowl, two tubs, one hundred balls of whiting, two bags of brick duſt, one coffee mill, one ſtone jar, one hundred pounds weight of loaf ſugar, one earthen pan, thirty pounds weight of butter, one cover, one knife, one pair of copper ſcales, one other pair of ſcales, one tin funnel,

one marble ſlab, one wood ſtand, one cheeſe knife, one chopper, two other knives, one butter print, one chip baſket, one hammer, twenty links, one thouſand bundle of matches, one tea caniſter, one thouſand yards of tape, one ſhow glaſs, fifty thimbles, forty balls of worſted, one other tea caniſter, forty pounds weight of tea, two other earthen jars, forty pounds weight of rappee ſnuff, two other jars, forty pounds weight of tobacco, one other jar, forty pounds weight of Scotch ſnuff, one hundred pounds weight of other ſnuff, one ſtone bottle, twenty gallons of vinegar, one hundred pounds weight of ſoap, five fire ſtones, twenty gallypots, twenty pounds weight of anchovies, one other ſhow glaſs, ſixty pounds weight of blue, five hundred yards of other tape, one other tea caniſter, one other ſhow glaſs, one hundred pounds weight of rice, one other jar, forty gallons of other vinegar, one hundred other balls of whiting, one coffee caniſter, two other tea caniſters, three rods, one counter, one other ſcale, ten weights, one half quartern meaſure, one tin pot, one other pair of copper ſcales, one other binn, ſeventy buſhels of ſmall coal, five other chip baſkets, one glaſs caſe, twenty other mops, ten other coal meaſures, one water tub, one pail, one card table, twelve mahogany chairs, two tea tables, two other tables, one pair of bellows, one Bath ſtove, one poker, one pair of tongs, two ſhovels, two fenders, one tea kettle, one trivet, nine tea pots, eleven pieces of earthen ware, ten diſhes, twenty-four plates, two cullenders, one pair of ſkates, two half pint pewter pots, one picture, one dreſſer, one ſtew pan, one hundred pounds weight of lead, one hundred pounds weight of iron, three other ſaucepans, two earthen diſhes, eleven pewter plates, five pewter diſhes, one ſtone bottle, one lead ink ſtand, one ruler, one rolling pin, one hat dreſſer, two other bruſhes, one ſtone rubber, three other knives, three other forks, one glaſs, one dreſſing glaſs, one other looking glaſs, ſix other mahogany chairs, one other table, one carpet, one cheſt, ſix ſuits of mens cloaths, ſix ſuits of other cloaths, ten pictures, one tea tray, forty pieces of china, one other bottle, one egg baſket, one plate, one baſon, one bedſtead, with check furniture thereto belonging, one bed, one bolſte

bolſter, two pillows, three blankets, and one coverlid, of the ſaid *William*, of a large value, to wit, of the value of ſixty pounds, there then found, and being in and upon a certain meſſuage or dwelling houſe of the ſaid *William*, with the appurtenanes, ſituate, and being in the ſaid pariſh of Saint Leonard, Shoreditch, in the county of Middleſex aforeſaid, and then and there, for a long time then elapſed, held and occupied by the ſaid *William*, as tenant thereof to the ſaid *Benjamin*, by virtue of and under a certain demiſe thereof thentofore made by the ſaid *Benjamin* to the ſaid *William* at and under a certain yearly rent, to wit, at the yearly rent of twelve pounds and twelve ſhillings payable by the ſaid *Benjamin* to the ſaid *William* quarterly, as, and for, and in the name of a diſtreſs for one quarter's rent, amounting to a ſmall ſum of money, to wit, the ſum of three pounds and three ſhillings, ſuppoſed to be before then due and payable, and then in arrear from the ſaid *William* to the ſaid *Benjamin* for rent of the ſaid premiſes, by virtue of the ſaid demiſe, and the ſaid *Benjamin* and *Richard* wrongfully and unjuſtly kept and detained, and cauſed to be kept and detained, the ſaid goods and chattels, ſo exceſſively diſtrained, under the ſaid diſtreſs, in their cuſtody for a long time, to wit, for the ſpace of five days then next following, againſt the laws and cuſtoms of this realm, (although at the time of the taking of the ſaid diſtreſs the ſaid *Benjamin* and *Richard* well knew the ſaid diſtreſs to be exceſſive and unreaſonable, and that a much leſs part, to wit, one tenth part of the ſaid goods and chattels of the ſaid *William* ſo diſtrained as aforeſaid, would then and there have been a reaſonable and ſufficient diſtreſs for the ſaid arrears of rent, and would have been ſufficient to have ſatisfied the ſaid arrears of rent, and all the coſts and charges of the ſaid diſtreſs, and of an appraiſement and ſale of the ſaid goods and chattels, had the ſame been ſold by virtue of and under the ſaid diſtreſs, and although the ſaid goods and chattels at the time of taking and diſtraining of the ſame, were in ſuch different, ſeparate, and diſtinct quantities, and of ſuch various and diſtinct qualities, that the ſaid *Benjamin* and *Richard* might then and there have diſtrained a reaſonable

part thereof, without diſtraining the whole thereof; by means whereof the ſaid *William* was, and is greatly injured, harraſſed, and aggrieved, to wit, at the pariſh aforeſaid; *And whereas* the ſaid *Benjamin* and *Richard* further contriving, and wrongfully, unjuſtly, injuriouſly, and maliciouſly, intending to hurt, injure, harraſs, aggrieve, and oppreſs the ſaid *William*, by another exceſſive and unreaſonable diſtreſs, againſt the laws and cuſtoms of this realm, afterwards, to wit, on the ſaid twelfth day of June, in the year aforeſaid, at the pariſh aforeſaid, in the county aforeſaid, exceſſively and unreaſonably took and diſtrained, and cauſed to be taken and diſtrained, divers other goods and chattels of the ſaid *William* of a large value, to wit, of the value of other ſixty pounds, there then found, and being in and upon a certain other meſſuage or dwelling houſe of the ſaid *William* with the appurtenances, ſituate and being in the ſaid pariſh of St. Leonard, Shoreditch, in the county of Middleſex aforeſaid, and then, and for a long time then elapſed, held, and occupied by the ſaid *William* as tenant thereof to the ſaid *Benjamin* by virtue of and under a certain demiſe thereof thentofore made by the ſaid *William* to the ſaid *Benjamin*, at and under a certain yearly rent, to wit, at and under the yearly rent of twelve pounds and twelve ſhillings, payable by the ſaid *William* to the ſaid *Benjamin* quarterly, as, and for, and in the name of diſtreſs, for one quarter of a year's rent of the rent aforeſaid, ſuppoſed to be before then due and payable, and then in arrear from the ſaid *William* to the ſaid *Benjamin* for rent of the ſaid premiſes by virtue of the ſaid demiſe, ſuch pretended arrears amounting to a ſmall ſum of money, to wit, to the ſum of three pounds and three ſhillings only, and no more; *and* the ſaid *Benjamin* and *Richard* wrongfully and unjuſtly, kept and detained, and cauſed to be kept and detained, the ſaid laſt mentioned goods and chattels, ſo exceſſively diſtrained, under the ſaid diſtreſs as laſt aforeſaid, in their cuſtody for a long time, to wit, for the ſpace of five days then next following, againſt the laws and cuſtoms of this realm, (although at the time of the taking of the ſaid laſt mentioned diſtreſs, the ſaid *Benjamin* and *Richard* well knew the ſaid laſt mentioned

tioned diſtreſs to be exceſſive and unreaſonable, and that a much leſs part or quantity, to wit, one tenth part of the ſaid laſt mentioned goods and chattels of the ſaid *William* ſo diſtrained as laſt aforeſaid, would then and there have been a reaſonable and ſufficient diſtreſs for the ſaid laſt mentioned arrears of rent, and would have been ſufficient to have ſatisfied the ſaid arrears of rent, and all the coſts and charges of the ſaid laſt mentioned diſtreſs, and of an appraiſement and ſale of the ſaid laſt mentioned goods and chattels, had the ſame been ſold by virtue of and under the ſaid laſt mentioned diſtreſs, and although the ſaid goods and chattels ſo diſtrained at the time of the taking and diſtraining of the ſame, were in ſuch different, ſeparate, and diſtinct quantities, and of ſuch various and diſtinct qualities, that the ſaid *Benjamin* and *Richard* might then and there have diſtrained a reaſonable part thereof without diſtraining the whole thereof, by means whereof the ſaid *William* was and is greatly injured, harraſſed, and aggrieved, to wit, at the pariſh aforeſaid; *and whereas* the ſaid *Benjamin* and *Richard* further intending to injure and oppreſs the ſaid *William* by another exceſſive and unreaſonable diſtreſs, againſt the laws and cuſtoms of this realm, afterwards, to wit, on the ſaid twelfth day of June, in the year aforeſaid, at the pariſh aforeſaid, exceſſively and unreaſonably took and diſtrained, other the goods and chattels of the ſaid *William*, of a large value, to wit, of the value of other ſixty pounds, and as in the name of a diſtreſs for a ſmall ſum of money, to wit, the ſum of three pounds and three ſhillings of rent, ſuppoſed to be due from the ſaid *William* to the ſaid *Benjamin*, and the ſaid laſt mentioned goods and chattels of the ſaid *William* ſo diſtrained as laſt aforeſaid, did detain for a long time, to wit, for the ſpace of five days then next following, againſt the laws and cuſtoms of this realm, to wit, at the pariſh aforeſaid; by means whereof the ſaid *William* was, and is greatly injured and oppreſſed, to wit, at the pariſh aforeſaid, to the ſaid *William* his damage of two hundred pounds. And therefore he brings ſuit, &c.

A. B. for the plaintiff, *C. D.* for the defendant. } Pledges to proſecute, { *John Doe*, and *Richard Roe*.

(Treſpaſs on the caſe.)

The whole proceedings in Ejectment by original.

The original writ.

Si fecerit te ſecurum.

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of Berkſhire greeting. *If Richard Red* ſhall give you ſecurity of proſecuting his claim, then put by gage and ſafe pledges *William White*, late of Newbury, gentleman, ſo that he be before us on the morrow of All-Souls, whereſoever we ſhall then be in England, to ſhew wherefore with force and arms he entered into one meſſuage with the appurtenances, in Sútton, which *John Rogers*, eſquire, hath demiſed to the aforeſaid *Richard*, for a term which is not yet expired, and ejected him from his ſaid farm, and other enormities to him did, to the great damage of the ſaid *Richard*, and againſt our peace. And have you there the names of the pledges, and this writ. *Witneſs* ourſelf at Weſtminſter, the twelfth day of October, in the twenty-ninth year of our reign.

Pledges of proſecution, { *John Doe.* *Richard Roe.*

Sheriff's return. The within named *William White* is attached by pledges, { *John Den.* *Richard Fen.*

Declaration againſt the caſual ejector, with notice to the tenant in poſſeſſion.

Michaelmas, the 29th of king George the Second.

Declaration. Berks, to wit. } *William White*, late of Newbury in the ſaid county, gentleman, was attached to anſwer *Richard Red*, of a plea, wherefore with force and arms he entered into one meſſuage, with the appurtenances, in Sutton in the county aforeſaid, which *John Rogers*, eſquire, demiſed to the ſaid *Richard Red* for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *Richard*, and againſt the peace of the lord the king, &c. And whereupon the ſaid *Richard* by *A. B.* his attorney complains, that whereas

whereas the ſaid *John Rogers*, on the firſt day of October, in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforeſaid, had demiſed to the ſaid *Richard* the tenement aforeſaid, with the appurtenances, to have and to hold the ſaid tenement, with the appurtenances, to the ſaid *Richard* and his aſſigns, from the feaſt of St. Michael the archangel then laſt paſt, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demiſe the ſaid *Richard* entered into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed; and the ſaid *Richard* being ſo poſſeſſed thereof, the ſaid *William* afterwards, that is to ſay, on the ſaid firſt day of October in the ſaid twenty-ninth year, with force and arms, that is to ſay, with ſwords, ſtaves, and knives, entered into the ſaid tenement, with the appurtenances, which the ſaid *John Rogers* demiſed to the ſaid *Richard* in form aforeſaid for the term aforeſaid which is not yet expired, and ejected the ſaid *Richard* out of his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *Richard*, and againſt the peace of the ſaid lord the king; whereby the ſaid *Richard* ſaith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings ſuit, &c.

A. B. for the plaintiff. } Pledges of { *John Doe.*
C. B. for the defendant. } proſecution, { *Richard Roe.*

Mr. *George Green.*

I am informed that you are in poſſeſſion of, or claim title to, the premiſes mentioned in this declaration of ejectment, or to ſome part thereof; and I, being ſued in this action as a caſual ejector, and having no claim or title to the ſame, do adviſe you to appear next Hilary term in his majeſty's court of king's bench at Weſtminſter, by ſome attorney of that court, and then and there, by a rule to be made of the ſame court, to cauſe yourſelf to be made defendant in my ſtead; otherwiſe I ſhall ſuffer judg- Notice.

ment to be entered againſt me, and you will be turned out of poſſeſſion.

Your loving friend,
William White.

Rule of Court.

Hilary term, in the twenty-ninth year of king George the Second.

Red againſt *White*; for one meſſuage with the appurtenances in Sutton, on the demiſe of *John Rogers.*

Berks, } to wit. } It is ordered by the court, by the aſſent of both parties, and their attornies, that *George Green*, gentleman, may be made defendant, in the place of the now defendant *William White*, and ſhall immediately appear to the plaintiff's action, and ſhall receive a declaration in a plea of treſpaſs aud ejectment of the tenements in queſtion, and ſhall immediately plead thereto, not guilty: and, upon the trial of the iſſue, ſhall confeſs leaſe, entry, and ouſter, and inſiſt upon his title only. And if, upon trial of the iſſue, the ſaid *George* do not confeſs leaſe, entry, and ouſter, and by reaſon thereof the plaintiff cannot proſecute his writ, then the taxation of coſts upon ſuch *nonproſ.* ſhall ceaſe, and the ſaid *George* ſhall pay ſuch coſts to the plaintiff, as by the court of our lord the king here ſhall be taxed and adjudged for ſuch his default in non performance of this rule; and judgment be entered againſt the ſaid *William White*, now the caſual ejector, by default. And it is further ordered, that, if upon the trial of the ſaid iſſue a verdict ſhall be given for the defendant, or if the plaintiff ſhall not proſecute his writ, upon any other cauſe, than for the not confeſſing leaſe, entry, and ouſter as aforeſaid, then the leſſor of the plaintiff ſhall pay coſts, if the plaintiff himſelf doth not pay them.

By the court.

A. B. for the plaintiff,
C. D. for the defendant.

The

The Record.

Pleas before the lord the king at Weſtminſter, of the term of Saint Hilary, in the twenty-ninth year of the reign of the lord George the Second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, &c.

Berks, to wit. } *George Green*, late of Sutton in the county aforeſaid, gentleman, was attached to anſwer *Richard Red*, of a plea, wherefore with force and arms he entered into one meſſuage, with the appurtenances, in Sutton, which *John Rogers* eſquire, hath demiſed to the ſaid *Richard* for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *Richard*, and againſt the peace of the lord the king that now is. *And whereupon* the ſaid *Richard* by *A. B.* his attorney complains, that whereas the ſaid *John Rogers* on the firſt day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforeſaid, had demiſed to the ſame *Richard* the tenement aforeſaid, with the appurtenances, to have and to hold the ſaid tenement, with the appurtenances, to the ſaid *Richard* and his aſſigns, from the feaſt of Saint Michael the archangel then laſt paſt, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demiſe the ſaid *Richard* entered into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed: and, the ſaid *Richard* being ſo poſſeſſed thereof, the ſaid *George* afterwards, that is to ſay, on the firſt day of October in the ſaid twenty-third year, with force and arms, that is to ſay, with ſwords, ſtaves, and knives, entered into the ſaid tenement, with the appurtenances, which the ſaid *John Rogers* demiſed to the ſaid *Richard* in form aforeſaid for the term aforeſaid which is not yet expired, and ejected the ſaid *Richard* out of his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *Richard*, and againſt the peace of the ſaid lord the king; whereby the ſaid *Richard* Declaration or count.

ſaith that he is injured and damaged to the value of twenty pounds; and thereupon he brings ſuit, [and good proof.] *And* the aforeſaid *George Green*, by *C. D.* his attorney, comes and defends the force and injuries when [and where it ſhall behove him;] and ſaith that he is in no wiſe guilty of the treſpaſs and ejectment aforeſaid, as the ſaid *Richard* above complains againſt him; and thereof he puts himſelf upon the country: and the ſaid *Richard* doth likewiſe the ſame; *Therefore* let a jury come thereupon before the lord the king, on the octave of the purification of the bleſſed virgin Mary, whereſoever he ſhall then be in England; who neither [are of kin to the ſaid *Richard*, nor to the ſaid *George*;] to recognize [whether the ſaid *George* be guilty of the treſpaſs and ejectment aforeſaid:] becauſe as well [the ſaid *George*, as the ſaid *Richard*, between whom the difference is, have put themſelves on the ſaid jury.] The ſame day is there given to the parties aforeſaid. *Afterwards* the proceſs therein, being continued between the ſaid parties of the plea aforeſaid by the jury, is put between them in reſpite, before the lord the king, until the day of Eaſter in fifteen days, whereſoever the ſaid lord the king ſhall then be in England; unleſs the juſtices of the lord the king aſſigned to take aſſizes in the county aforeſaid, ſhall have come before that time, to wit, on Monday the eighth day of March, at Reading in the ſaid county, by the form of the ſtatute [in that caſe provided,] by reaſon of the default of the jurors, [ſummoned to appear as aforeſaid.] At which day before the lord the king, at Weſtminſter, come the parties aforeſaid by their attornies aforeſaid; and the aforeſaid juſtices of aſſize, before whom [the jury aforeſaid came,] ſent here their record before them had in theſe words, to wit: *Poſtea.* *Afterwards*, at the day and place within contained, before *Keneage Legge*, eſquire, one of the barons of the exchequer, of our lord the king, and Sir *John Eardly Wilmot*, knight, one of the juſtices of the ſaid lord the king, aſſigned to hold pleas before

Defence.

Plea, not guilty.

Iſſue.

Venire awarded.

Reſpite, for default of jurors.

Niſi prius.

fore the king himself, justices of the said lord the king, assigned to take assizes in the county of Berks by the form of the statute [in that case provided,] come as well the within-named *Richard Red*, as the within-written *George Green*, by their attornies within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, *Charles Holloway*, *John Hooke*, *Peter Graham*, *Henry Cox*, *William Brown*, and *Francis Oakley*, come, and are sworn upon that jury: and because the rest of the jurors of the same jury did not appear, therefore others of the by-standers being chosen by the sheriff, at the request of the said *Richard Red*, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed anew, to wit, *Roger Bacon*, *Thomas Small*, *Charles Pye*, *Edward Hawkins*, *Samuel Roberts*, and *Daniel Parker*, being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn, being elected, tried and sworn, to speak the truth of the matter within contained, upon their oath say, that the aforesaid *George Green* is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid *Richard Red* within complains against him; and assess the damages of the said *Richard Red*, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence: and, for those costs and charges, to forty shillings. *Whereupon* the said *Richard Red*, by his attorney aforesaid, prayeth judgment against the said *George Green*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid: and the said *George Green*, by his attorney aforesaid, saith that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said *George Green*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be

Tales de circumstantibus.

Verdict for the plaintiff.

Motion in arrest of judgment.

be ſtayed, by reaſon that the ſaid verdict is inſufficient and erroneous, and that the ſame verdict may be quaſhed, and that the iſſue aforeſaid may be tried anew by other jurors to be afreſh impanelled. And, becauſe the court of the lord the king here is not yet adviſed of giving their judgment of and upon the premiſes, therefore day thereof is given as well to the ſaid *Richard Red* as the ſaid *George Green*, before the lord the king, until the morrow of the Aſcenſion of our lord, whereſoever the ſaid lord the king ſhall then be in England, to hear their judgment of and upon the premiſes, for that the court of the lord the king is not yet adviſed thereof. At which day before the lord the king at Weſtminſter, come the parties aforeſaid by their attornies aforeſaid: upon which, the record and matters aforeſaid having been ſeen, and by the court of the lord the king now here fully underſtood, and all and ſingular the premiſes having been examined, and mature deliberation being had thereupon, for that it ſeems to the court of the lord the king now here that the verdict aforeſaid is in no wiſe inſufficient or erroneous, and that the ſame ought not to be quaſhed, and that no new trial ought to be had of the iſſue aforeſaid, *Therefore it is conſidered*, that the ſaid *Richard* do recover againſt the ſaid *George* his term yet to come, of and in the ſaid tenements, with the appurtenances, and the ſaid damages aſſeſſed by the ſaid jury in form aforeſaid, and alſo twenty-ſeven pounds ſix ſhillings and eight pence for his coſts and charges aforeſaid, by the court of the lord the king here awarded to the ſaid *Richard*, with his aſſent, by way of increaſe; which ſaid damages in the whole amount to twenty-nine pounds ſeven ſhillings and eight pence. "And let the ſaid *George* be "taken [until he make fine to the lord the king]." *And hereupon* the ſaid *Richard* by his attorney aforeſaid prayeth a writ of the lord the king, to be directed to the ſheriff of the county aforeſaid, to cauſe him to have poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances: and it is granted unto him, returnable before the lord the king on the morrow of the holy Trinity,

Continuance.

Opinion of the court,

Judgment, for the plaintiff.

Coſts.

Capiatur pro fine.

Writ of poſſeſſion,

and return.

Trinity, whereſoever he ſhall then be in England. At which day before the lord the king, at Weſtminſter, cometh the ſaid *Richard* by his attorney aforeſaid; and the ſheriff, that is to ſay, Sir *Thomas Reeve*, knight, now ſendeth, that he by virtue of the writ aforeſaid to him directed, on the ninth day of June laſt paſt, did cauſe the ſaid *Richard* to have his poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances, as he was commanded.

N. B. The parts within crotchets are uſually expreſſed in the record by an &c.

* Formerly if judgment for the plaintiff, it was alſo conſidered that the defendant be either amerced for his willful delay of juſtice in not rendering the plaintiff his due, or be taken up (*capiatur*) till he pay a fine to the king for the public miſdemeanor which accompanies private injury in all caſes of force of falſhood in denying his own deed, or unjuſtly claiming property in replevin or of contempt in not obeying the king's writ on the expreſs prohibition of any ſtatute. But now in caſe of treſpaſs, ejectment, aſſault, and falſe impriſonment, it is enacted 5 & 6 *W. & M. c.* 13. that no writ of *capias* ſhall iſſue for this fine nor any fine be paid, but, that the plaintiff ſhall pay ſix ſhillings and eight-pence to the proper officer, and be allowed it with his other coſts againſt the defendant; ſo that now no notice is taken of any fine or *capias*. *Salk.* 54. *Carth.* 390.

Of delivering the Declaration.

The declaration is to be ingroſſed on treble a penny ſtamp, and the plaintiff's attorney charges on the back thereof four-pence per ſheet, ſeventy-two words to a ſheet, beſides the duty; and warrant of attorney four-pence; if he filed common bail according to the ſtatute, filing common bail ſeven ſhillings and two-pence.

When the defendant muſt plead in four days.

Upon

Upon proceſs returnable the firſt or ſecond return of any term, if tht plaintiff declares in London, or Middleſex, and the defendant lives within twenty miles of London, the declaration muſt be delivered with notice to plead, within four days after delivery, and the defendant muſt plead without imparlance; but if the plaintiff declares in any other county, or the defendant lives above twenty miles from London, the declaration muſt be delivered with notice to plead within eight days after delivery, and the defendant muſt plead without imparlance; or on default, plaintiff may ſign judgment. *R. Tr.* 5 & 6 *Geo.* 2.

When in eight days.

The declaration to be delivered four days before the end of the term.

The four and eight days are accounted excluſive of the day of the delivery of the declaration, and the declaration muſt be delivered four days before the end of the term, excluſive of the day of delivery, otherwiſe the declaration hath an imparlance. *Ibid.*

In what caſe declaration may be left in the office.

When bail either ſpecial or common is filed, and notice given, the plaintiff's attorney is to deliver the declaration to the attorney for the defendant, who ſhall pay for the ſame: and on refuſal, or if the abode of the attorney for the defendant be not known, then the plaintiff's attorney is to file the declaration, and immediately give notice to the defendant and, the declaration ſhall be deemed well delivered from the time of ſuch notice. *R. Trin.* 2 *Geo.* 2.

If the declaration to be left in the office, notice to be given to the defendant.

When the defendant hath been ſerved with a copy of the proceſs, and appearance entered, or common bail filed by the plaintiff's attorney, and a copy of the declaration filed, notice muſt be given to the defendant, by delivering to, or leaving for him at his laſt or moſt uſual place of abode, a note in writing, ſignifying the nature of the action, at whoſe ſuit, and the time allowed for pleading thereto; and unleſs he plead within ſuch time, judgment will be entered againſt him by default; and from the time only of giving ſuch notice, the declaration ſhall be deemed well delivered, but not otherwiſe; and the plaintiff, if the defendant doth not plead within the time may ſign judgment, without further or other calling for a plea; and give notice of executing a writ of enquiry, either by delivering ſuch notice to the defendant, or leaving ſame at his laſt or moſt uſual place of abode. *R. Trin.* 1 *Geo.* 2.

Upon

Upon all proceſs, returnable before the laſt return of any term, where no affidavit ſhall be made and filed of the cauſe of action purſuant to the act of parliament for preventing vexatious arreſts, the plaintiff may file or deliver the declaration *de bene eſſe*, at the return of ſuch proceſs, with notice to plead in eight days, after the filing or delivery thereof; and if the defendant does not file common bail, and plead within the ſaid eight days; the plaintiff having filed common bail for ſuch defendant according to the ſaid act, may ſign judgment for want of a plea, provided that ſuch declaration be delivered or filed, and notice thereof given four days excluſive, before the end of ſuch term, and a rule to plead be duly entered. *Rule, Trinity*, 22 *Geo.* 3. Of delivering declarations *de bene eſſe*, where no affidavit filed, upon proceſs returnable before the laſt return.

Upon proceſs returnable as aforeſaid, where an affidavit ſhall be made and filed of the cauſe of action, purſuant to the ſaid act, the declaration may be filed or delivered *de bene eſſe* at the return of ſuch proceſs with notice to plead in four days after ſuch filing, or delivery, if the action be laid in London or Middleſex, and the defendant live within twenty miles of London, and in eight days if the action is laid in any other country, or the defendant lives above twenty miles from London; and if the defendant puts in bail, and doth not plead within ſuch times as are reſpectively before mentioned, judgment may be ſigned, provided that ſuch declaration be delivered or filed, and notice thereof given, four days excluſive before the end of ſuch term, and a rule to plead be duly entered. *Rule, Trinity*, 22 *Geo.* 3. Of delivering declaration *de bene eſſe*, where an affidavit is filed.

If the proceſs be returnable on any other return than the firſt, ſecond, or third, return of any term, the defendant is intituled to an imparlance, and in ſuch caſe, the notice muſt be for the defendant to plead within the firſt four days of the next term. When the defendant is intituled to an imparlance

In caſes where the plaintiff hath filed, or ſhall file, common bail for the defendant purſuant to the act, the plaintiff in ſuch action or ſuit, wherein common bail hath been, or ſhall be ſo filed as aforeſaid, may deliver a declaration by the bye againſt the defendant, but no other perſon ſhall. *M.* 10 *Geo.* 2. 2 *Str.* 1027. Declaring by the bye.

If ſpecial or common bail be filed by defendant, any perſon may declare againſt him by the bye.

But if ſpecial or common bail be filed by the defendant, any perſon may deliver or file a declaration againſt him by the bye, at any time within the ſame term wherein the proceſs againſt the defendant is returnable, *ſedente curia*; and the practice hath been, that the plaintiff, at whoſe ſuit the proceſs is, might declare againſt the defendant in as many actions as he thinks fit, before the end of the next term, after the return of the proceſs. *Ibid.*

Where the proceedings are by bill, if a defendant is in court, either by being in actual cuſtody of the marſhal, or by a voluntary appearance at any plaintiff's ſuit, any other plaintiff is at liberty to deliver a declaration by the bye againſt him, within the ſame term wherein the writ was returnable. 4 *Burr.* 2181.

The delivery of a declaration before ſpecial bail is put in, is a waiver of the bail; and if before bail be juſtified, it is an acceptance of them, unleſs delivered *de bene eſſe*.

If an original be ſued out in one county, and the declaration laid in another, though it be good againſt the defendant, yet the bail are diſcharged, and not liable to a *ſci. fa.* otherwiſe if by bill. 3 *Lev.* 235, 245.

Time to declare.

The plaintiff muſt declare before the end of the term, next after the return of the proceſs, or the defendant may ſign a *nonpros* (if the action be by bill), without entering any rule to declare, and the defendant ſhall have coſts taxed as uſual. 13 *Car.* 2. *c.* 2. *ſ.* 5. But if the action be by original, a rule to declare muſt be given, before a *nonpros* can be ſigned, which rule is had from the maſter, and muſt be entered with the clerk of the rules. Rule, 15. 10*d.* the plaintiff's attorney is to be ſerved with a copy of this rule, and if he does not deliver a declaration within the time allowed, the attorney for the defendant is to make a demand of ſame in writing, and in twenty-four hours after ſervice of the demand, may ſign judgment of *nonpros*. But the plaintiff may get a ſide bar rule from the clerk of the rules the laſt day of the term, for time to declare till the firſt day of the next term. Rule 41. a copy of which is to be ſerved on

on the defendant's attorney; or, if he does not appear, ſtuck up in the office: if the ſuit be by original, and a demand is made of a declaration, the plaintiff muſt have a judge's order for time to declare, which is obtained by taking out a ſummons for that purpoſe, ſerving defendant's attorney with a copy of ſuch ſummons, and the judge will thereon grant the order.

Notice of declaration de bene eſſe *where the action is bailable.*

William White, plaintiff.
In the king's bench. and
Benjamin Black, defendant.

Take notice that a declaration was this day filed with the clerk of the declarations in the king's bench office, in the Inner Temple, London, conditionally (until ſpecial bail is put in and perfected), as of this preſent Hilary term, againſt you, at the ſuit of the above named plaintiff, in an action of treſpaſs on the caſe on ſeveral promiſes, to the plaintiff's damage of fifty pounds, and unleſs you plead thereto in four days * from the date hereof, judgment will be ſigned againſt you by default. Dated this twenty-ſeventh day of January, 1783. Yours, &c.

* If in the country eight days.

A. B. attorney for the plaintiff.

To Mr. *Benjamin Black*, the above-named defendant.

Upon common proceſs.

William White, plaintiff.
In the king's bench, and
Benjamin Black, defendant.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the king's bench office, in the Inner Temple, London, conditionally, (until common bail be filed), as of this preſent Hilary term, againſt you, at the ſuit of the above named plaintiff, in an action of treſpaſs on the caſe on ſeveral promiſes, to the plaintiff's damage of fifty pounds; and unleſs you appear and plead thereto in eight days from the date hereof, judgment will be

ſigned againſt you by default. Dated this twenty-ſeventh day of January, 1783.

Yours, &c.

A. B. attorney for the plaintiff.

To Mr. *Benjamin Black*,
the above defendant.

If bail is filed according to the ſtatute.

William White, plaintiff.
In the king's bench. and
Benjamin Black, defendant.

Take notice, that a declaration was this day filed with the clerk of the declarations, in the king's bench office, in the Inner-Temple, London, as of this preſent Hilary term, againſt you, at the ſuit of the above-named plaintiff, in an action of treſpaſs on the caſe on ſeveral promiſes, to plaintiff's damage of fifty pounds; and unleſs you plead thereto in four days* from the date hereof, judgment will be ſigned againſt you by default. Dated this twenty-ſeventh day of January, 1783.

* If in the country eight days.

Yours, &c.

A. B. attorney for the plaintiff.

To Mr. *Benjamin Black*,
the above defendant.

Chap. XI.

Of the Plea, &c.

PLEAS are of two ſorts, dilatory pleas, and pleas to the action.

Dilatory pleas are ſuch as tend merely to delay or put off the ſuit, by queſtioning the propriety of the remedy, rather than denying the injury. Pleas to the action are ſuch as diſpute the very cauſe of ſuit. A dilatory plea cannot be pleaded after a general imparlance, for that is an acknowledgement of the propriety of the action.

Dilatory pleas are 1. To the *juriſdiction* of the court, as that it ought not to hold plea of this injury,

it

it arising in *Wales* or beyond the sea, &c. 2. To the *disability* of the plaintiff, as that he is an alien enemy, outlawed, excommunicated, attainted of felony, under a *præmunire*, not in *rerum natura* (being only a fictitious person) an infant, a feme covert, or a monk professed. 3. In *abatement*, which abatement is either of the writ, or the declaration (or count) for some defect in one of them, as a *misnomer*, or misnaming the defendant; or giving him a wrong addition, as esquire instead of knight, (gentleman and esquire have, it seems, been held to to be the same addition) or other want of form in any material respect; or it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is, that *actio personalis moritur cum persona*, 4 Inst. 325. And it shall never be revived, either by or against the representatives; for neither the executors of the plaintiff have received; nor have those of the defendant committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, when the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived by or against the executors, *March.* 14.

No dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable cause shewn to the court to induce them to believe it to be true, 4 & 5 *Ann. c.* 16. No exception shall be admitted against a declaration or writ, unless the defendant shall, in the same plea, give the plaintiff a better, *Brownl.* 139. that is, shew him how it may be amended, that there may not be two objections on the same account.

Pleas to the jurisdiction conclude to the cognizance of the court, praying "judgment whether the court will have further cognizance of the suit."

Pleas

Pleas to the disability conclude to the person, by praying "judgment if the said *William* the plaintiff ought to be answered."

And pleas in abatement, when the suit is by original, conclude to the writ or declaration, by praying "judgment of the writ (or declaration) and that the same may be quashed," *cassetur*; but if the action be by bill; the plea must pray "judgment of the bill," and not of the declaration, the bill being in this case the original, and the declaration only a copy of the bill.

When a dilatory plea is allowed, the cause is either dismissed from that jurisdiction, or plaintiff is stayed until his disability be removed, or he is obliged to sue out a new writ by leave obtained from the court, *Co. Ent.* 271. or to amend his declaration. But if over-ruled, the judgment is, that the defendant, *respondeat ouster*, shall answer over, or plead to the action.

Pleas to the action are to the merits of the complaint, either by confession or denial; thus a plea of tender is a confession of the debt; as is also a plea of set off, by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against it, either in the whole, or as to part; as if the plaintiff sue for twenty pounds for goods sold, the defendant may plead a set off of ten pounds for work, and pay the remainder into court. Payment of money into court alone is also a confession of the justice of part of the plaintiff's demand.

Pleas that totally deny the cause of complaint, are either the *general issue*, or a *special plea* in bar.

The general issue denies the whole declaration, as in trespass, either *vi et armis*, or on the case, *non culpabilis*, not guilty, in debt upon contract, *nihil debet*, the defendant owes nothing, in debt on bond; *non est factum*, it is not his deed; on an *assumpsit*, *non assumpsit*, the defendant made no such promise: these pleas are called the general issue, because being a denial of what is alledged in the declaration, they amount at once to an issue, or an affirmation of a fact on the one side and a denial on the other.

Special

Special pleas in *bar* are various, according to the circumſtances of the caſe, as an accord, arbitration, conditions performed, nonage of the defendant, or ſome other fact which precludes the plaintiff from his action. A juſtification is alſo a ſpecial plea in bar; as in aſſault and battery, *ſon aſſault de meſne*, that the plaintiff firſt aſſaulted the defendant, in treſpaſs, that the defendant had a right to do the thing complained of; in an action of ſlander, that the words ſpoken were true; pleas of the ſeveral ſtatutes of limitation are alſo pleas in bar.

By 4 & 5 *Ann. c.* 16. two or more diſtinct matters may be pleaded at once, by leave of the court, as in *aſſumpſit*, *non aſſumpſit*, and *non aſſumpſit infra ſex annos*; (or the ſtatute of limitations) in aſſault and battery, not guilty, *ſon aſſault demeſne*, and the ſtatute of limitations.

Special pleas are commonly in the affirmative; but may be in the negative; and always advance ſome new matter, with reſpect to which they conclude, "and this he is ready to verify;" whereas the general iſſue totally denying the facts advanced in the declaration throws the whole proof upon the plaintiff.

If the plea doth not amount to an iſſue or total denial of the declaration, the plaintiff may reply either traverſing, that is, totally denying the plea; or he may alledge new matter, as when the defendant pleads *no award made*, the plaintiff may in reply, ſet forth the award, and aſſign a breach; or the replication may confeſs, and avoid, the plea by ſome new matter or diſtinction conſiſtent with the declaration. To the replication the defendant may rejoin; the plaintiff may then anſwer the rejoinder by a ſurrejoinder, to which the defendant may rebut, and to the rebutter the plaintiff may put in a ſurrebutter. 4 *Inſt.* 14. *Bract. l.* 5 *tr.* 5. *c.* 1.

It muſt be obſerved in pleading not to vary from the title or defence which the party hath once inſiſted upon; thus the replication muſt ſupport the declaration; and the rejoinder ſupport the plea; as in the

the caſe of a bond of arbitration, if the defendant pleads, no award made, and the plaintiff replies, ſetting forth an award, the defendant cannot rejoin, that he hath performed that award which he hath in his plea denied to have ever been made.

Yet many times when the plaintiff hath aſſigned in his declaration a general wrong, he may, after an evaſive plea, reduce the matter to a greater certainty by aſſigning the injury afreſh with it's ſpecific circumſtances, ſo as to clearly aſcertain it, which is termed a *new*, or *novel aſſignment*, as if the plaintiff declare on a breach of his cloſe in *D.* and the defendant pleads that the place where the treſpaſs is alledged to have been committed, is a certain cloſe in *D.* which is his own freehold; the plaintiff may in his replication aſſign another cloſe in *D.* ſpecifying the boundaries, as the real place of the injury. 1 *Inſt.* 124.

A *proteſtation* is an oblique, but at the ſame time avoids a direct affirmation or denial that a matter doth or doth not exiſt, which *Coke* defineth to be, "an excluſion of a concluſion." 1 *Inſt.* 124. as if the plaintiff ſet forth an award, and can aſſign a breach of one part, as the non-payment of a ſum of money, and is afraid to admit the performance of the reſt, or to aver a general non-performance, he may alledge the general non-performance by proteſtation, and plead only the non-payment of the money.

In pleading, when either ſide advances any new matter, he avers it in this manner, "and this he is ready to verify;" a traverſe or denial of it coming from the defendant is, "and of this he puts himſelf upon the country," thereby ſubmitting himſelf to the judgment of his peers; which judgment, if the traverſe lies on the plaintiff, is prayed (or the iſſue tendered) in another form, "and this he prays may be inquired of by the country."

But if any ſide plead a ſpecial negative plea, not denying what was before alledged, but inſiſting upon ſome new negative matter, (as in an action upon a bond of arbitration when the defendant pleads no award)

award) he tenders no iſſue, becauſe it doth not yet appear, whether the fact will be diſputed; but when the plaintiff replies, ſetting forth an actual ſpecific award, if the defendant traverſes and denies the making of ſuch award, he then tenders an iſſue to the plaintiff.

Rules to plead are made out on unſtamped paper, in this manner: Rules to plead.

White againſt *Black*,
Red againſt *Green*, } Rules to plead.

6th November, 1783. *A. B.* attorney.

This note is to be taken to the clerk of the rules (in Symond's Inn) who is paid for each rule 1*s.* 10*d.* theſe rules he enters in a book kept for that purpoſe; the rule expires in four days, excluſive of the day on which it is given; and Sunday, or any holiday on which the court does not ſit, is yet accounted one of the four days (except it happens to be on the laſt day of the four); if given on the "Purification," that is no day. *R. Trin.* 1 *G.* 2. *T.* 5 *G.* 2. *M.* 10 *G.* 2.

A rule to plead may be given any time in term, or within four days after term.

If defendant wants time to plead, he muſt take out a judge's ſummons, for the plaintiff to ſhew cauſe why he ſhould not be allowed ſuch time, and ſerve the plaintiff's attorney with a copy thereof, and upon attending the judge thereon; he will make an order for the defendant's being allowed time to plead; but he will be bound down to the terms of "pleading iſſuably, rejoining gratis, and taking ſhort notice of trial," (if the plaintiff is in time to proceed to trial); if not, "only pleading iſſuably." Application for time.

If four terms are elapſed ſince the declaration was delivered, the defendant muſt have a whole term's notice to plead, unleſs the cauſe has been ſtayed by injunction or privilege.

The clerk of the rules will accept a rule to plead on the eſſoign day; but it can be entered only, as of the firſt day of term.

If the declaration has been delivered to the defendant's attorney (or in caſe he has appeared in time) a Demanding plea.

demand muſt be made of a plea, before judgment can be ſigned (although notice has been given of a declaration being filed.)

The demand of a plea.

In the king's bench.

White againſt *Black.*

The plaintiff demands a plea in this cauſe.

A. B. attorney for the plaintiff.

4 Feb. 1783.

This note muſt be delivered to the defendant's attorney.

If the rule to plead is out before a plea is demanded, the defendant has only the next morning after the demand to plead in.

If the declaration is delivered in chief, that is, after common bail is filed, either by the defendant or by the plaintiff, according to the ſtatute, and notice thereof is given by plaintiff, no demand of plea is neceſſary.

The demand of a plea is a waiver of bail; or if bail is already put in, an acceptance of ſuch bail; therefore, before a demand is made, care ſhould be taken that bail is put in and juſtified.

A demand of plea is neceſſary in this court againſt a priſoner in cuſtody of the marſhal, or any ſheriff, gaoler, &c.

Of an imparlance.

An imparlance or, *licentia loquendi*, is an opportunity that the plaintiff ſhall have to ſee if he can end the matter amicably, by talking with the plaintiff, a practice which is ſuppoſed, *Gilb. Hiſt. Com. Pl* 35. to have ariſen from that precept of the goſpel, "Agree with thine adverſary quickly, whilſt thou art in the way with him." *Matth.* v. 25. like as the Roman law, which expreſly directed the plaintiff and defendant to make up the matter in the way or going to the Prætor— *in via, rem ut pacunt erato.*

If the writ is returnable before the laſt return of any term, and the declaration be not delivered or filed, and alſo notice of filing given before the laſt four days excluſive, of the term the writ is returnable of, the defendant is of courſe intitled to an imparlance;

parlance; and if returnable on the laſt return, the defendant is intitled to an imparlance; but muſt plead in four days of the next term, in whatever county the declaration ſhall be laid, *R. Trin.* 22 *G* 3. But if a writ be returnable in one term, and the declaration is not delivered before the eſſoign day of the ſecond term, the defendant is not obliged to plead in the ſame term.

No ſpecial imparlance is to be allowed, without leave of the court. *Rule E.* 5 *Ann.*

If four terms are elapſed, after the declaration is delivered, the defendant ſhall have a whole term's notice to plead, before judgment can be entered, unleſs the cauſe has been ſtayed by injunction or privilege, *Tr.* 5 & 6 *Geo.* 2. In this caſe notice muſt be to the defendant, or his attorney, before the eſſoign of the term in which the plaintiff intends to proceed, by giving a rule to plead.

The like rule muſt be given to reply, rejoin, &c. if the cauſe has ſtood ſtill at any of thoſe other ſtages.

The plea is to be ſearched for at the clerk of the papers in Symond's Inn, who keeps two books, by plaintiff's name; if no plea there, ſearch muſt be made with the clerk of the judgments, at the king's bench office, who keeps the general iſſue book; and if there is no plea, the plaintiff may ſign judgment by default; all pleas are to be engroſſed on a treble penny ſtamped paper. Searching for plea.

A plea in abatement muſt be pleaded before the rule is out; and cannot be pleaded after a common imparlance, unleſs the declaration be delivered after term, or ſo late in the term, that the defendant is not bound to plead to it in that term; in both which caſes the defendant may, within the firſt four days, incluſive of the next term, plead any plea in abatement, or to the juriſdiction of the court, as of the preceding term; but if ſuch plea be not delivered, or left in the office in time, (whether a rule to plead be given or not) ſuch plea is not to be received. *E.* 5 *Ann. Trin.* 5 & 6 *Geo.* 2. Pleas in abatement.

Sunday, or any day on which the court does not ſit, is to be accounted as one of the four days, (unleſs it happens to be the laſt day.) *Rule, Eaſt.* 5 *Ann.*

"No dilatory plea ſhall be received, unleſs the party, by affidavit, prove the truth thereof, or ſhew ſome probable matter, to induce the court to believe that it is true." 4 & 5 *Ann. c.* 16.

A plea in abatement muſt be ſigned by counſel, and filed with the clerk of the papers; and without an affidavit of the truth thereof annexed to ſuch plea, judgment may be ſigned.

Demand of oyer.

If the action is on a bond, deed, or other ſpecialty, the defendant may demand oyer of the ſame, and to have a copy of it, and cannot be compelled to plead after demand, till ſuch time as it is given him.

The demand of oyer is ſo called from the French *oyer*, to hear, (that is to hear it read to him) as the generality of the defendants, in the times of ancient ſimplicity, were ſuppoſed incapable of reading the inſtrument themſelves; and thereupon the whole of it is entered *verbatim* on the record; and the defendant may take advantage of any condition or other part of it not ſtated in the plaintiff's declaration.

Demand of oyer.

In the king's bench. *White* againſt *Black.*

The defendant demands oyer, and a copy of the writing obligatory, in the declaration mentioned, and of the condition thereof.

A. B. attorney for the plaintiff.

The defendant cannot now have *oyer* of the original writ as formerly. *R. Trin.* 19 *Geo.* 3.

The defendant muſt pay for the copy 4*d. per* ſheet, and he has as much time to plead, after he hath had *oyer*, as he had when it was demanded. *R.* 5 *Geo.* 2. *Str.* 705.

Plea in bar.

A plea in bar is to be pleaded within the time before mentioned.

The general iſſue.

The general iſſue is either to be engroſſed on a treble penny paper, and delivered to the plaintiff's attorney,

attorney, or entered in the general iſſue book, with the clerk of the judgments, paying ſixpence.

Special pleas are to be engroſſed and filed with the clerk of the papers, and to be ſigned by counſel. Fee, 10s. 6d. (except the following.) *comperuit ad diem* to a bail-bond, *ſon aſſault demeſne, plene adminiſtravit*, by an executor or adminiſtrator, *riens per diſcent, nul tiel record, per minas, ſolvit ad diem, ne unques executor, infra ætatem.* R. 18 Car. 2.

The defendant by leave of the court, may plead as many different pleas as he ſhall think neceſſary. *Stat. 4 Ann. c.* 16.

If the defendant plead double, a brief muſt be given to the counſel, naming the plea, which he ſigns of courſe; Fee, ten ſhillings and ſixpence; this brief is to be taken to the clerk of the rules, with the plea, who will draw up the rule.

N. B. If the defendant is in not time, the plea may be filed firſt, and the copy of the rule ſerved on the plaintiff's attorney afterwards.

If the defendant be not ready to plead by the time the rule expires, he may apply to a judge for a ſummons for time; a copy of which is to be ſerved on the plaintiff's attorney; and on attending the judge, and he will make ſuch order (but this may be done by conſent) and it muſt be upon terms, if the plaintiff is in time to try his cauſe, "Of pleading iſſuably, rejoining gratis and taking ſhort notice of trial for the laſt ſittings in term" or after, as the caſe happens.

As no plea but an iſſuable one can be pleaded after an order for time obtained; therefore a recovery in a former action cannot be pleaded after an order obtained. 2 *Burr.* 782.

Writs of error were formerly brought upon very ſlight and trivial grounds, as miſ-ſpellings, and other miſtakes of clerks, all which might be amended at the common law, whilſt all the proceedings were in paper, 1 *Burr.* 222. 2 *Burr.* 1098. for they were then conſidered only *in fieri*, and therefore ſubject to the controul of the courts; but when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unleſs within

Of amending pleadings.

within the very term in which the judicial act ſo recorded was done; for, during the term, the record is in the breaſt of the court; but afterwards it admitted of no alteration, *Co. Lit.* 260. At preſent the courts are more liberal, and where juſtice requires it, will allow of amendments at any time whilſt the ſuit is depending, notwithſtanding the record be made up, and the term paſt; and after error brought, a judgment may be amended without coſts, by *ſtat.* 4 *Ann.* c. 16. *ſect.* 25.

The plaintiff may amend his declaration, paying coſts, or giving an imparlance, at the plaintiff's election.

The declaration may be amended after plea pleaded, or iſſue delivered, in matter of form, without coſts; but, in ſubſtance, it cannot, or after ſpecial plea.

If the declaration be amended after plea, the defendant has two days to plead *de novo*, although coſt are paid. If a rule to plead be entered the ſame term the amendment is made (though given before) it is ſufficient, and a new one need not be given. *Rule. Mich.* 10 *Geo.* 2.

After plea pleaded, or after the ſecond term, the plaintiff ſhall not add a new count to his declaration, under pretence of amending his declaration. *Rule, Mich.* 10 *Geo.* 2.

After argument on demurrer, and before the court gave judgment, leave was given to amend. *Str.* 954.

Amendment may now be made even in penal actions, but ſo as not to alter the charge. 5 *Burr.* 2853. And they may be done by ſummons before a judge before iſſue entered on record, and filed in the treaſury. Pleas and replications alſo may be amended.

Of a ſet off. At common law, if the plaintiff was more indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to ſtrike a balance, but muſt go into a court of equity for doing of what is moſt clearly juſt and right to be done; but in order to prevent ſuch expence, it is now enacted, "That where there are mutual debts, between the plaintiff and defendant, and if either party ſue, or be ſu-

ed

ed as executor or adminiſtrator, where there are mutual debts between the teſtator or inteſtate, one debt may be ſet againſt the other, and ſuch matter may be given in evidence upon the general iſſue, or pleaded in bar, as the nature of the caſe requires, ſo as at the time of his pleading the general iſſue, where any ſuch debt of the plaintiff, his teſtator or inteſtate, is intended to be inſiſted on in evidence, notice ſhall be given of the particular ſum or debt, ſo intended to be inſiſted on, and upon what account it became due; or otherwiſe, ſuch matter ſhall not be allowed in evidence upon ſuch general iſſue. 2 *Geo.* 2. *c.* 22.

Mutual debts may be ſet againſt each other, either by pleading in bar, or given in evidence on the general iſſue, in the manner as in the 2 *Geo.* 2, *c.* 22. mentioned, notwithſtanding that ſuch debts are deemed in law to be of a different nature, unleſs in caſe where either of the ſaid debts ſhall accrue by reaſon of a penalty contained in any bond or ſpecialty; and in all caſes where either the debt for which the action hath been, or ſhall be brought, or the debt intended to be ſet againſt the ſame hath accrued, or ſhall acrue by reaſon of any ſuch penalty, the debt intended to be ſet off, ſhall pleaded in bar; in which plea ſhall be ſhewn how much is truly and juſtly due on either ſide; and in caſe the plaintiff ſhall recover in any ſuch action or ſuit, judgment ſhall be entered for no more than ſhall appear to be truly and juſtly due to the plaintiff, after one debt being ſet againſt the other as aforeſaid. 8 *Geo.* 2 *c.* 24. made perpetual, 14 *Geo.* 2. *c.* 34. 21 *Geo.* 2. *c.* 33. 29 *Geo.* 2. *c.* 28".

"Where it ſhall appear to the commiſſioners, that there has been mutual credit given to the bankrupt and any other perſon, or mutual debts between the bankrupt and any other perſons, at any time before ſuch perſon became bankrupt, the commiſſioners or the aſſignees of the bankrupt's eſtate, ſhall ſtate the account between them, and one debt may be ſet againſt another, and what ſhall appear to be due on the balance, and no more, ſhall be claimed or paid on either ſide". 5 *Geo.* 2. *c.* 30.

In

In replevin, the avowant juſtified under a diſtreſs for rent; the plaintiff at *niſi prius* inſiſted, that there was more due to him than the rent amounted to, and *Denniſon* J. refuſed the evidence; upon a motion for a new trial, the court held that 2 *Geo.* 2. did not extend to the caſe of a diſtreſs, for that is not an action, but a remedy without ſuit; they likewiſe declared, that it did not extend to detinue, and the like actions of wrong. *Bul.* 177.

In an action on a promiſſory note, the plaintiff took a verdict for the whole ſum; the defendant had, at the ſame ſittings an action againſt the plaintiff, for eleven pounds, to which there was a notice to ſet off the note of hand; the court held that notwithſtanding the verdict, the note of hand might be ſet off, for if at the time of the action brought, there are mutual demands, they, by the ſtatute, may be ſet off, and juſtice may be done by entering a *remittitur* on the firſt record as to ſo much. 2 *Burr.* 1229.

Debt upon a ſimple contract may be ſet off againſt a ſpecialty debt, a ſimple contract againſt a debt upon an annuity bond, 6 *Burr.* 820. Mutual debts between the teſtator, and executor, without ſuit, *Bull.* 75. Simple contract againſt debt upon a leaſe for non-payment of rent, *Ibid* 177. And all actions where the demands are of the ſame nature, may be ſet off, and a judgment in king's bench, may be ſet off againſt a judgment in common pleas, 3 *Wiſ.* 396. But notice of ſet-off need not be given by the defendant, in an action for money had and received to the plaintiff's uſe, where the defendant had paid the plaintiff his whole demand: (except what he retained for his labour and ſervice) 4 *Burr.* 2134.

But debt due to a man in right of his wife, in an action againſt him, on his own bond, cannot be ſet off, *Bull.* 175. Nor can a penalty upon articles of agreement, though forfeited, nor ſimple contract for cloaths to a bail-bond, *Ibid.* Nor can there be a ſet off in replevin, though the diſtreſs was taken for rent, *Ibid* 177. Nor can a bond be ſet off at the ſuit of aſſignees of a bankrupt, to an action by them, for goods ſold and delivered. 1 *Wiſ.* 155.

A debt

A debt barred by ſtatute of limitations, cannot be ſet off; if pleaded, the plaintiff may reply the ſtatute: if it is given in evidence plaintiff may object to it. *Bull.* 176. *Str.* 1271.

A defendant may, after pleading the general iſſue, move to withdraw it, and plead anew with a ſet off. *Str.* 1267.

A judgment in the king's bench may be ſet off in the common pleas, and the balance due to plaintiff ordered to be paid, upon motion. 3 *Wilſ.* 396.

A ſet off, reducing the balance under forty ſhillings does not effect the juriſdiction of the court, and plaintiff will be intituled to coſts. 1 *Wilſ.* 19. *St.* 1191.

A plea of an equal ſum being due from the plaintiff to the defendant is a bar to the action; but if it be of a leſs ſum the defendant muſt pray to have it ſet-off *Cooke* v. *Dixon. Bull* 175.

Of paying money into court.

The practice of paying money into court was introduced for the ſake of giving a party (who might never have had it in his power to make a tender, or had neglected to make one) an opportunity of ſatisfying the debt, for which an action hath been commenced, and likewiſe to deliver him from the neceſſity of proving the tender, if he had made one.

Money may be paid into court in all actions where the ſum demanded is either certain, or capable of being aſcertained by mere computation, without leaving any ſort of diſcretion to be exerciſed by the jury; in which caſe the defendant is admitted to pay the money into court, and have ſo much of the plaintiff's demand upon him ſtruck out of the declaration; and if the plaintiff will not accept it, he ſhall proceed at his peril. 2 *Burr.* 1220.

In actions on the caſe upon *indebitatus aſſumpſit*, where there is a *quantum meruit*. *Str.* 576. Debt for rent *Salk.* 596. Replevin where the defendant avows for rent in arrear. *Ibid.* In covenant for non-payment of rent, or where the ſum is aſcertained. *Salk.* 299. Ejectment for rent or non-payment of mortgage-money. *Str.* 576. Upon a charter-party of afreightment, where the breaches are only for freight

and demorage. 2 *Burr.* 1120. Trover for monies numbered, or in a bag. *Burr.* 1864. Trover for a ſpecific chattel, of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the real value, but that it's real and aſcertained value muſt be the ſole meaſure of the damages. *Ibid.* Debt for five pounds in killing a hare. *Str.* 1217. money may be brought into court. But in covenant upon a charter-party and trover, and debt for a penalty, the court muſt be eſpecially moved upon an affidavit of the facts.

Formerly the defendant in action of debt upon bond, who had obtained the common rule, to bring money into court muſt, have brought in the whole penalty; but now this hardſhip is remedied, for it is enacted, "that if pending an action upon a bond with condition to be void upon payment of a leſſer ſum, the defendant ſhall bring into court all the principal money, and intereſt due, and coſts; the ſaid money ſhall be taken to be a full ſatisfaction of the ſaid bond, and ſhall diſcharge defendant." 4 *Ann. c.* 16. *Sect.* 13.

Bond given for money payable by inſtallments, action is brought for the penalty on non-payment of one of the inſtallments, the court will give leave to pay the money in arrear and coſts, but the plantiff may ſign judgment, with a ſtay of execution, until there be a failure in ſome future payment. *Str.* 977.

The like in debt for an annuity, 3 *Burr.* 1353. but where a bond was given for a groſs ſum, abſolutely at a day certain, in April, 1750, and an agreement in January, 1758 was entered into, that the money ſhould be payable by inſtallments, with proviſoe that the ſums agreed to be taken by inſtallments, ſhould be punctually and regularly paid by defendant, at and upon the very days ſpecified in the defeazance for making the reſpective payments, otherwiſe to be void; yet where defendant made two payments good, and neglected one, the court would not allow him to bring that ſum and coſts into court. 3 *Burr.* 1373.

In what actions money cannot be paid into court.

In actions on the caſe for immoderately driving a hired chaiſe, and for conſequential damages, treſpaſs for

for the meſne profits in ejectment; for dilapidations, debt upon a bond to a ſheriff conditioned for the good behaviour of the bailiff, and *inter alia*, for paying money collected for the ſheriff's caſe; upon a bond for the performance of a collateral agreement, upon a counter bond; covenant for not doing repairs, debt for goods ſold, treſpaſs for taking goods; replevin, where it is not for rent, money cannot be brought into court.

Twenty ſhillings for every one hundred pounds is to be paid to the chief clerk for keeping the money; if under ten pounds two ſhillings, and according to that rate for every greater or leſſer ſum. *Rule* 5, *Jac.* 1.

The court gave leave to withdraw the general iſſue in order to bring money into court, and replead it, not delaying the plaintiff. *Str.* 1271.

Method of paying money into court.

On paying money into court, a brief; that is an half ſheet of paper blank within; but indorſed with the name of the cauſe and beneath, "pleaſe to move to pay five pounds into court," is to be given counſel, fee, ten and ſixpence; and on his ſigning it is taken to the ſigner of the writs, who acts as agent to the ſecondary, who by rule, *Eaſter*, 5 *Jac.* 1. is appointed for that purpoſe and the money paid to him, who gives a receipt, and is paid two ſhillings; the brief and receipt are then taken to the clerk of the rules, who draws up the rule, Rule five ſhillings; a copy of this rule muſt be ſerved on the plaintiff's attorney, and at the ſame time, the plea delivered if the plaintiff accepts the money in full diſcharge of his ſuit, he is intitled to coſts to the time the money is paid, in which caſe he proceeds, by getting an appointment on the rule from the maſter to tax the coſts, which, is ſerved on the defendant's attorney; and on attending the maſter thereon, he will mark the coſts on the rule when taxed. But if the plaintiff does not accept the money with coſts, he may take the money out of court, (on producing an office copy of the rule) in part of his demand, and proceed to trial; if on the trial he does not recover a greater ſum than the money paid into court he will be nonſuited, and muſt pay coſts to the defendant.

If Plantiff accepts the money.

Proceeding if the costs are not paid.

If the plaintiff proceeds on the rule, if the costs are not paid when taxed, he may deliver the issue, and notice of trial, and take a verdict for one shilling, though he does not make out his demand so much as defendant has paid in. *Str.* 1220.

When the defendant is not liable to pay costs.

There may be a case in which money may be paid into court without costs; as where a plaintiff kept out of the way to prevent a tender, and upon summons before a judge to pay debt and costs, his attorney pretended he had other demands, and refused to name the sum, which obliged the defendant to pay money into court, and apply to the court that so much of the rule as related to costs might be discharged, with costs of the application; the court looked upon these proceedings to be oppressive, and discharged the rule, but not with the costs of the application. 1 *Burr.* 571.

Tender.

Tender, is the offering of money, or any other thing, in satisfaction, or circumspectly to endeavour the performance of a thing; as a tender of rent is to offer it at the time and place when and where it ought to be paid; and it is an act done to save the penalty of a bond: it may be made of money in bags, or untold, for it is the receiver's business to tell it, and it must be by offering the bags to the plaintiff, and not holding them under the arm, *Noy.* 73. it must be made before the writ sued out.

By several late statutes (particularly 11 *Geo.* 2. *c.* 19. in case of an irregular distress, and 24 *Geo.* 2. *c.* 224. in case of mistakes committed by justices of the peace) tender of sufficient amends to party agreived is a bar of all actions, whether he shall accept such tender or not.

In pleading a tender the defendant must say, that he hath always been ready, *tout temps prist*, and still is ready *uncore prist* to discharge the debt, for a tender by the debtor, and refusal by the creditor will in all cases discharge the costs, 1 *Vent.* 21. but not the debt itself; though in some particular cases the creditor will totally loose all his money. *Litt. s.* 338. *Co. Litt.* 209.

There is a difference in pleading a tender in an action of debt, and in an action on the case; in debt, the damages are but necessary, so that in pleading a tender to such action, " the defendant must pray judgment

judgment of the damages;" but in *assumpsit*, the damages are principal, and he is to plead "*tout temps prist (semper paratus,")* that he always hath been ready with a *profert hic in curia*, that he hath the money in court, and "*pray judgment de ulterioribus damnis.*" or whether the plaintiff is intitled to any further damages. *Salk.* 622. 3 *Salk.* 344.

Tender of goods.

If a tender at the day, of corn, or of any other goods of a perishable kind, be pleaded with a refusal, there is no need to plead "*uncore prist.*" 9 Rep. 79. 1 Inst. 207.

Wherever the debt, or duty arises, at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender, to plead a tender and refusal, and *uncore prist*; but he must also plead, "*tout temps prist.*" Salk. 622, 12 Mod. 152. Carth. 413.

Every requisite, which is in a particular case necessary to the validity of a tender, must in pleading such tender be shewn to have been complied with; else the plea is not good. *Salk.* 624.

Tender of stock.

Tender of stock, must be at the last part of the day it can be accepted, *Str.* 777. and the usual hours must be set forth, 832.

Formerly it was held, that tender could not be pleaded after imparlance, but now it may, even after a judge's order for time. 1 *Burr.* 59.

Fresh demand and refusal.

A right to damages, on account of the non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again, by a demand, subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof, upon such demand. 5 *Bac.* 12. *Brownl.* 71.

In cases where the tender is not a discharge of the debt, before a tender is pleaded, the money must be paid into court; which is done by paying the same to the signer of the writs without any rule, who writes a receipt on the plea before it is filed filed, *Hil.* 5 *Jac.* 1. if the plaintiff takes issue on the tender only, he must not take the money out of court, and if such issue be found against him, he will be barred of his action: but if he takes the money tendered

dered out of court, judgment is given for the defendant to go quit as to that plea; and he may proceed on the general iſſue, if he pleaſes, for the reſidue. *Lord Raym.* 774.

Tender by juſtices. Tender of amends may be made by a juſtice of the peace, for any thing done by him in the execution of his office, and he may plead ſame with not guilty, and any other plea, with leave of the court; and in caſe he ſhall neglect to make ſuch tender, he may, before iſſue joined, pay money into court. 24 *Geo.* 2. *c.* 44. *ſ.* 24.

Treſpaſs. The defendant may, to a treſpaſs *quare clauſum fregit*, plead a diſclaimer, and that the treſpaſs was by negligence or involuntary, and tender of ſufficient amends before action brought; whereupon, or upon ſome of them, the plaintiff ſhall be enforced to join iſſue. 21 *Jac.* 1.

Diſtreſs. Tender may be made, before the action, for any unlawful act done by a perſon who has diſtrained for rent juſtly due, 11 *Geo.* 2. *c.* 19. *ſ.* 20. likewiſe in diſtraining for money juſtly due for the relief of the poor. 17 *Geo.* 2. *c.* 38. *ſ.* 10.

A tender in any money coined at the Mint, upon which there is the king's ſtamp, is good; for all ſuch money is good in proportion to its value without a proclamation. *Salk.* 446. *Comb.* 387.

No tender of payment in ſilver money, exceeding twenty-five pounds at any one time, ſhall be a ſufficient tender in law for more than its value by weight at the rate of five ſhillings and two-pence an ounce. 14 *Geo.* 3. *c.* 42.

A tender of a bank-note, as money, is not, ſtrictly ſpeaking, a good tender; but if the tenderer offer to get money for the note, this makes it a good tender. *Eq. Caſ. Abr.* 319.

Pleas in abatement.

Coverture. And the ſaid *Mary*, in her own proper perſon, comes and prays judgment of the bill aforeſaid of the ſaid plaintiff, becauſe ſhe ſays, that ſhe now is, and before the day of exhibiting the bill of the ſaid plaintiff was, and ever ſince hath been, covert, and married, to one *Benjamin Black*, then and ſtill her huſband,

to

to wit, at London aforeſaid, in the pariſh and ward aforeſaid, and this ſhe is ready to verify; wherefore becauſe the ſaid *Benjamin Black* is not named in the bill aforeſaid, the ſaid *Mary* prays judgment of the bill aforeſaid, and that the ſame may be quaſhed, &c.

And the ſaid *Benjamin Black* againſt whom the ſaid plaintiff hath exhibited his ſaid bill, by the name of *Thomas Black*, in his own proper perſon, comes and pleads, that he was baptiſed by the name of *Benjamin*, to wit, at Weſtminſter aforeſaid, in the county aforeſaid, and by the name of *Benjamin*, hath always, hitherto, ſince his baptiſm, been called and known; without this, that the ſaid *Benjamin* now is, or at the time of exhibiting the bill of the ſaid plaintiff was, or ever before had been, or ever ſince hath been called by the chriſtian name of *Thomas*, as by the ſaid bill is above ſuppoſed; and this he the ſaid *Benjamin* is ready to verify; wherefore he prays judgment of the ſaid bill, and that the ſame may be quaſhed, &c. Wrong chriſtian name.

Affidavit of the truth of a plea in abatement.

Benjamin Black, of &c. gentleman, the defendant in this cauſe, maketh oath and ſaith, that the plea hereto annexed is true in ſubſtance and matter of fact.

Benjamin Black.

The General Iſſue.

And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he did not undertake and promiſe, in manner and form, as the ſaid plaintiff hath above thereof complained againſt him, and of this he puts himſelf upon the country, &c. *Non aſſumpſit.*

And the ſaid defendant by *C. D.* his attorney, comes and defends the wrong and injury, when &c. and ſays, that he ought not to be charged with the ſaid debt, by virtue of the ſaid writing obligatory, becauſe he ſaith, that the ſaid writing obligatory is not his deed, and of this he puts himſelf upon the country, &c. *Non eſt factum.*

And

Non eſt factum on an indenture. And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he ought not to be charged with the payment of the ſaid debt, by virtue of the ſaid indenture, becauſe he ſaith, that the ſaid indenture is not his deed, and of this he puts himſelf upon the country.

Nil debet. And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he doth not owe to the ſaid plaintiff the ſaid one hundred pounds, or any part thereof, in manner and form as the ſaid plaintiff hath above thereof complained againſt him, and of this he puts himſelf upon the country.

Nil debet on *qui tam.* And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he doth not owe to our ſaid lord the king, and to the ſaid plaintiff, who as well, &c. the ſaid hundred pounds, or any part thereof in manner and form as the ſaid plaintiff hath above declared againſt him, and of this he puts himſelf upon the country.

Non aſſumpſit by an exor. And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that the ſaid *John*, in his life-time did not undertake and promiſe in manner and form as the ſaid plaintiff hath above thereof complained againſt him, and of this he puts himſelf upon the country, &c.

Non detinet. And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he doth not detain from the ſaid plaintiff the ſaid one hundred pounds, or any part thereof, in manner and form as the ſaid plaintiff hath above declared againſt him, and of this he puts himſelf upon the country.

Non culpabilis in caſe. And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he is not guilty of the treſpaſs aforeſaid in manner and form as the ſaid plaintiff hath above declared againſt him, and of this he puts himſelf upon the country.

And

And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and ſays, that he is not guilty of the treſpaſs and aſſault in manner and form as the ſaid plaintiff hath above thereof complained againſt him, and of this he puts himſelf upon the country. Not guilty in treſpaſs and aſſault.

And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that he is not guilty of the premiſes above laid to his charge in manner and form, &c. Not guilty in treſpaſs.

And the ſaid defendant, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and as to the breach of covenant firſt above aſſigned ſays, that the ſaid plaintiff ought not to have or maintain his aforeſaid action thereof againſt him, becauſe he ſays, that nothing whatſoever of the ſaid rent in that breach mentioned, is in arrear from the ſaid defendant, to him the ſaid plaintiff, as the ſaid plaintiff above thereof complains againſt him, and of this he puts himſelf upon the country, &c. Iſſue in covenant.

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays that he did not promiſe and undertake, in manner and form as the ſaid *William* hath above thereof complained againſt him, and of this he puts himſelf upon the country, &c. *Non aſſumpſit* inſtead of a ſet off.

Notice of ſet off for work and labour as a carpenter.

In the king's bench.

Between *William White*, plaintiff,
and
Benjamin Black, defendant.

Take notice, that the above defendant will, at the trial of this cauſe, give in evidence, and inſiſt, that the plaintiff, before and at the commencement of this ſuit, was, and ſtill is, indebted unto the ſaid defendant, in the ſum of fifty pounds, for the work and labour of him the ſaid defendant, by him and his ſervants done and performed in his the ſaid defendant's occupation or buſineſs of a carpenter, for the ſaid plaintiff, and at his requeſt, and for divers materials found and provided in and about the ſaid work, at the like requeſt of the ſaid plaintiff, and alſo for

the work and labour, care and diligence, of the ſaid defendant, by him before then done and performed, for the ſaid plaintiff; and at his requeſt, and alſo for money paid, laid out, and expended by the ſaid defendant, for the ſaid plaintiff; and at his like requeſt, and for money by the ſaid defendant before then lent and advanced to the ſaid plaintiff; and at his like requeſt, and for money, by the ſaid plaintiff, before that time had and received, to and for the uſe of the ſaid defendant, and for divers goods, wares and merchandizes, by the ſaid defendant before that time ſold and delivered to the ſaid plaintiff; and at his requeſt, and for money due and owing from the ſaid plaintiff to the ſaid defendant, upon an account ſtated between them, which ſum of fifty pounds is ſtill due and owing from the ſaid plaintiff to the ſaid defendant, and out of which ſum, he the ſaid defendant will, at the trial, ſet off, and allow to the ſaid plaintiff, ſo much againſt any demands, of the ſaid plaintiff, to be proved at the ſaid trial, as will be ſufficient to ſatisfy ſuch demand, purſuant to the ſtatute in ſuch caſe made and provided. Dated, &c.

Yours, &c.

C. D. attorney for the defendant.

To Mr. *A. B.* attorney
for the plaintiff.

Special Pleas.

Plea of the ſtatute of limitation.

Statute of limitation.

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and ſaith that the ſaid *William* ought not to have or maintain his ſaid action againſt him, becauſe he ſaith, that he did not undertake in manner and form as the ſaid *William* hath in his declaration above ſuppoſed; and for further plea in this behalf, the ſaid defendant, by leave of the court here, for this purpoſe firſt had and obtained, according to the form of the ſtatute in ſuch caſe made and provided, ſays, that the ſaid plaintiff ought not to have or maintain his aforeſaid action thereof againſt him the ſaid defendant, becauſe he ſaith, that the ſaid ſeveral

cauſes

causes of action did not, nor did any of them, accrue to the said plaintiff, at any time, within six years next before the day of the exhibiting the bill of the said plaintiff, and this the said defendant is ready to verify: wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

Replication and issue.

And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded in bar, says, that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that the said defendant did, within six years before the the day of exhibiting the said bill of the said plaintiff, to wit, at Westminster aforesaid, undertake and promise, in manner and form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, and the said defendant doth the like: therefore as well to try this issue, as the said other issue above joined, let a jury thereupon come before our lord the king at Westminster, on next after twelve, &c. by whom, &c. and who neither, &c. to recognize, &c.

Plea of non assumpsit, and a tender.

Non assumpsit and tender.

And the said defendant, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and as to the second promise and undertaking, in the said declaration mentioned, as to forty pounds part of the said sum of fifty pounds, in the said promise and undertaking, in the said declaration also mentioned, says, that he did not undertake and promise, in manner and form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c. And as to ten pounds in the said first promise and undertaking, in the said declaration mentioned, he the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than ten pounds in this behalf, because he saith, that he the said defendant, after the making of the said first promise and undertaking,

dertaking, in the ſaid declaration mentioned, as to the ſaid ten pounds reſidue of the ſaid fifty pounds, and before the exhibiting the bill of the ſaid plaintiff, to wit, on the firſt day of June, in the year of our lord one thouſand ſeven hundred and eighty-two, in the pariſh and ward aforeſaid, was ready to pay, and then and there offered to pay to the ſaid plaintiff the ſaid ten pounds, and then and there tendered payment thereof to the ſaid plaintiff, to receive which of the ſaid defendant, he the ſaid plaintiff, then and there wholly refuſed: and the ſaid defendant further ſays, that he the ſaid defendant, always from the time of the making of the ſaid firſt promiſe and undertaking, as to the ſaid ten pounds hitherto at London aforeſaid, in the pariſh and ward aforeſaid, has been ready, and yet is there ready, to pay to the ſaid plaintiff, the ſaid ten pounds, and now brings the ſame into court, ready to pay to the ſaid plaintiff, if he the ſaid plaintiff, will accept thereof, and this he is ready to verify; wherefore he prays judgment if the ſaid plaintiff ought to have or maintain his aforeſaid action thereof againſt him, to recover any more or greater damages than ten pounds in this behalf, &c.

Replication and iſſue.

And the ſaid plaintiff, as to the ſaid plea of the ſaid defendant, above pleaded as to the ſaid ten pounds reſidue of the ſaid fifty pounds in the ſaid firſt promiſe, mentioned in the ſaid declaration, ſays, that he, by reaſon of any thing in that plea alledged, ought not to be barred from having and maintaining his aforeſaid action thereof againſt him the ſaid defendant, to recover his full damages in this behalf, becauſe he ſays, that the ſaid defendant did not tender, or offer to pay to the ſaid plaintiff, the ſaid ten pounds in manner and form as the ſaid plaintiff hath above thereof complained againſt him; and of this he puts himſelf upon the country, and the ſaid defendant doth the like, &c. Therefore as well to try this iſſue, as the ſaid other iſſue above joined, let a jury, thereupon come before our lord the king at Weſtminſter, on the octave of the Purification of the bleſſed Virgin Mary, whereſoever he ſhall than be in England, who neither, &c. to recognize, &c. becauſe as well, &c.

And

Plea of infancy.

And the ſaid *Benjamin* by *C. D.* his attorney comes and defends the wrong and injury when, &c. and ſays, that the ſaid *William* ought not to have or maintain his ſaid action againſt him. Becauſe he ſays, that he the ſaid defendant, at the time of the making the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, was under the age of twenty-one years, to wit, of the age of eighteen years, and no more, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, and this he is ready to verify. Infancy.

Plea of a judgment recovered in C. B. in caſe.

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays, that the ſaid *William* ought not to have or maintain his aforeſaid action thereof againſt him, becauſe, he ſays, that heretofore, to wit, in Hilary term, in the twenty-ſecond year of the reign of his preſent majeſty, the ſaid *William*, impleaded the ſaid *Benjamin*, in the court of our lord the king, of the bench at Weſtminſter, in the county of Middleſex, before Alexander lord Loughborough, and his companions, then his majeſty's juſtices of the bench, in a plea of treſpaſs on the caſe, on promiſes, to the damage of the ſaid *William*, of fifty pounds, on occaſion of the not performing the very ſame identical promiſes and undertakings in the ſaid declaration mentioned, and ſuch proceedings were thereupon had in the ſaid court of the bench aforeſaid; that afterwards, to wit, in that very ſame Hilary term, in the twenty-ſecond year aforeſaid, the ſaid *William* by the conſideration and judgment of the ſaid court of the bench, recovered againſt the ſaid *Benjamin*, in that plea, fifty-pounds for his damages which he had ſuſtained, on occaſion of the not performing the ſaid promiſes, and undertakings, in the ſaid declaration mentioned, and whereof the ſaid *Benjamin* was convicted, as by the record Judgment in *C. B.* in caſe.

record, and proceedings thereof, remaining in the ſaid court of the bench aforeſaid, at Weſtminſter aforeſaid, more fully appears; which ſaid judgment ſtill remains in its full force, ſtrength and effect, not in the leaſt vacated, ſet aſide, paid off, annulled, ſatisfied or diſcharged; and this he is ready to verify by the ſame record; wherefore he prays judgment, if the ſaid *William* ought to have or maintain his aforeſaid action thereof againſt him, &c.

Plea of a judgment recovered in debt.

Judgment in *C. B.* in debt.

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſays that the ſaid *William* ought not to have or maintain his aforeſaid action thereof againſt him, becauſe he ſays that the ſaid *William* heretofore, to wit, in Hilary term, in the twenty-ſecond year of the reign of his preſent majeſty, impleaded the ſaid *Benjamin*, in his majeſty's court before Alexander lord Loughborough and his companions, then his majeſty's juſtices of the bench, at Weſtminſter, in a certain plea of debt, for fifty pounds of and upon the ſaid identical writing obligatory, in the ſaid declaration mentioned, and ſuch proceedings were thereon had, in the ſaid court of the bench, in that plea, that the ſaid *William* afterwards, to wit, in that very ſame term, in the twenty-ſecond year aforeſaid, by the conſideration and judgment of that court, recovered in the ſaid plea, againſt the ſaid *Benjamin*, his debt aforeſaid, and alſo five pounds which in the ſaid court of the bench, in that plea, were adjudged to him, as well for his damages which he had ſuſtained, on the occaſion of the detaining of the ſaid debt, as for his coſts and charges by him laid out about his ſuit in that behalf, whereof the ſaid *Benjamin* was convicted, as by the record, and proceedings thereof, ſtill remaining in the ſaid court of the bench at Weſtminſter aforeſaid, more fully and at large appears, which ſaid judgment ſtill remains in its full force, ſtrength, and effect, not in the leaſt reverſed or made void; and this he the ſaid *Benjamin* is ready to verify, by the

the ſaid record; wherefore he prays judgment if the ſaid *William* ought to have his aforeſaid action thereof maintained againſt him.

Plene adminiſtravit, *and a judgment out ſtanding.*

And the ſaid *Benjamin* by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſaith, that the ſaid *William* ought not to have or maintain his ſaid action againſt him, becauſe he ſays that the ſaid *John* in his life time, did not undertake in manner and form as the ſaid *William* hath in his declaration above ſuppoſed: and for further plea, in this behalf the ſaid defendant, by leave of the court, here for the purpoſe firſt had and obtained, according to the form of the ſtatute in that caſe made and provided, ſays, that he the ſaid *Benjamin*, hath fully adminiſtered all and ſingular the goods and chattels, which were of the ſaid *John*, at the time of his death, which have ever come to his hands to be adminiſtered, to wit, at London aforeſaid, in the pariſh and ward aforeſaid, and that the ſaid *Benjamin* hath not, nor had he on the day of exhibiting the aforeſaid bill of the ſaid *William*, or at any time afterwards, any goods or chattels, which were of the ſaid *John*, at the time of his death, in the hands of the ſaid *Benjamin*, to be adminiſtered, and this he is ready to verify, wherefore, &c. And for further plea in this behalf, the ſaid *Benjamin*, by leave of the court here for this purpoſe firſt had and obtained, according to the form of the ſtatute in that caſe made and provided, ſays that the ſaid *William* ought not to have or maintain his aforeſaid action thereof againſt him, becauſe he ſays that one *Richard Red*, heretofore (that is to ſay) in Hilary term, in the twenty-ſecond year of the reign of our lord the now king, in the court of our lord the king, before the king himſelf, the ſaid court, then, and ſtill, being held at Weſtminſter in the ſaid county, by the conſideration and judgment of the ſaid court, recovered againſt the ſaid *Benjamin*, as well a certain debt of fifty pounds, as alſo ſixty-three ſhillings for his damages which he had ſuſtained,

Plene adminiſtravit, and a judgment.

ed,

ed, as well by reaſon of the detaining of the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf expended, to be levied of the goods and chattels which were of the ſaid *John*, at the time of his death, in his hands to be adminiſtered if he had ſo much in his hands to be adminiſtered, and if he had not ſo much in his hands to be adminiſtered, then the damages aforeſaid to be levied of the proper goods and chattels of the ſaid *Benjamin*, whereof the ſaid *Benjamin* was convicted as by the record, and proceedings thereof, remaining in the ſaid court of our ſaid lord the king, before the king himſelf, at Weſtminſter aforeſaid, more fully appears; which ſaid judgment ſtill remains in its full force and effect, not paid off, ſatisfied, diſcharged, or made void; and which ſaid judgment, ſo had and obtained, was ſo had and obtained for a true and juſt debt of twenty-five pounds, due and owing to the ſaid *Richard*, from the ſaid *John* at the time of his death: and the ſaid *Benjamin* further ſays, that he hath fully adminiſtered all and ſingular the goods and chattels which were of the ſaid *John* at the time of his death, which have ever come to or been in his hands to be adminiſtered, (except goods and chattels to the value of five ſhillings) to wit, at London aforeſaid, in the pariſh and ward aforeſaid, and that the ſaid *Benjamin* hath not, nor at the time of the exhibiting the bill of the ſaid *William*, or at any other time ſince, hitherto had any goods or chattels, which were of the ſaid *John* at the time of his death, in the hands of him the ſaid *Benjamin* to be adminiſtered, (except the ſaid goods and chattels to the value of five ſhillings) and which are not ſufficient to ſatisfy and diſcharge the ſaid judgment, in form aforeſaid recovered againſt the ſaid *Benjamin* as adminiſtrator as aforeſaid, and which are liable to the payment and diſcharge of the ſaid judgment, and are bound thereto, and charged therewith, and this he is ready to verify; wherefore, &c.

Of moving the court to abide by plea.

If the defendant pleads a ſpecial plea, as a judgment recovered in another court for the ſame cauſe, or ſuch a plea as the plaintiff thinks he will not abide by, the plaintiff may move the court for the defendant to ſtand by ſuch plea, or plead ſuch other on the morrow as he will ſtand by, which is done by giving inſtructions to counſel for ſuch motion, which, when ſigned by the counſel, are taken to the clerk of the rules, who will draw up the rule accordingly; Rule 5*s.* counſel 10*s.* 6*d.* a copy of the rule is to be ſerved on the defendant's attorney; but if the defendant abides by the plea, the plaintiff will not be allowed this in coſts. Motion to abide by plea.

If the defendant does not plead a new plea, then the plaintiff proceeds to make up the paper-book.

Replication, rejoinder, ſurrejoinder, rebutter and ſurrebutter.

To compel the party to reply, rejoin, ſurrejoin, rebut, or ſurrebut; a rule is had from the maſter on the back of the plea, which is entered with the clerk of the rules, paying 1*s.* 10*d.* a copy of this rule muſt be ſerved on the oppoſite attorney thus: Replication.

White v. *Black*, "Saturday next after eight days of the Purification to reply, entered."

This is a four day rule excluſive, and on demand of replication, &c. if none, a *non pros* may be ſigned.

If no proceedings have been had for four terms, *i. e.* one year from the day of the laſt proceeding, then there muſt be a whole term's rule given to reply, &c. unleſs the cauſe hath been ſtayed by injunction or privilege, and ſuch rule muſt be given before the eſſoign day. *Str.* 1164.

A rule to reply, rejoin, &c. may be given at any time in term-time, or after the end of term.

Chap. XII.

Of the Paper-book.

Paper-books made up by attornies.

PAPER-BOOKS are the iſſues upon ſpecial pleadings, and made up by the clerk of the papers; and ſpecial pleadings are to be filed with the clerk of the papers; but every clerk or attorney in this court may make up the iſſue in—every iſſue that may be given on the book ſide of the office, not guilty to a *novel* aſſignment, to the bar of *ſons frank tenement*; "*comperuit ad diem*, *nul tiel record*, in covenant, every ſpecial *non eſt factum*, *ſon aſſault demeſne*, on a general demurrer to a declaration, in all replcaders, and in all iſſues and demurrers upon writs of error, *ſcire facias*, and *audita querela*.

By the clerk of the papers.

But in all ſpecial pleadings the clerk of the papers having a copy of the declaration from the plaintiff's attorney, makes out and delivers him the paper-book, with a rule in the margin for the defendant's attorney to receive the ſame, and return it within a given time; for this paper-book the plaintiff's attorney pays the clerk of the papers 8*d*. *per* ſheet for the whole book; and 4*d*. *per* ſheet for all pleadings ſubſequent to the declaration, beſides ſtamps.

If iſſue is joined, the plaintiff's attorney uſually indorſes a notice of trial upon the paper-book, and then delivers it to the defendant's attorney, who muſt return it to be enrolled according to the rule in the margin; which, if he neglects to do, and does not pay 8*d*. *per* ſheet for the pleadings on his ſide; and 4*d*. *per* ſheet, (called iſſue-money) for thoſe on the ſide of the plaintiff; the plaintiff may ſign judgment by default, as if no plea pleaded, and the plaintiff need not accept the book afterwards; but neither the declaration, ſtamps, nor any other part of the paper-book are to be paid for by the defendant, unleſs he hath not before paid for them.

But although the plaintiff may ſign judgment for non-payment of the iſſue-money, yet it cannot be done

done until twenty-four hours after the iſſue is delivered, *Wenham* v. *Triſtram*, *Hil.* 21 *Geo.* 3.

If the paper-book be made up and delivered in term, or within eight days after term, the defendant's attorney muſt return it in four days, and if the *venue* is laid in any other county than London or Middleſex, it muſt alſo be returned in four days; but if the *venue* be laid in London or Middleſex, the defendant hath till the fourth day of the next term to return it, as it was too late to give notice of trial for the then ſittings after term, but it is otherwiſe in a country cauſe, where notice of trial may be given in due time for the aſſizes.

But if the plaintiff's attorney accept the book after the limitted time he cannot ſign judgment.

If the paper-book be of an iſſue in fact, the four days for keeping it are excluſive of the day of delivery if after demurrer, the four days are reckoned incluſive. *Rule*, *Trin.* 1 *Geo.* 2.

Tueſdays and Fridays are called ſpecial paper-days, becauſe the court goes into the paper before they enter upon motions.

In all ſpecial pleadings where the plaintiff takes iſſue upon the defendant's pleading, or traverſeth the ſame, or demurs ſo as the defendant is not let in to alledge any new matter, there the plaintiff may make up the paper-book without giving a rule to rejoin, otherwiſe a rule muſt be given.

If the paper-book is not an iſſue on which the plaintiff can go to trial, *viz.* an iſſue on a *nul tiel record*, on a plea of a judgment recovered, &c. and the defendant returns the book without ſtriking out any of the pleadings, the maſter will indorſe on the paper-book "A rule to produce the record," this rule is entered with the clerk of the rules, paying one ſhilling and tenpence, a copy of which is ſerved on the defendant's attorney; this done, all the proceedings are to be entered on the roll exactly as they are in the paper-book; firſt entering the term, then warrants of attorney for plaintiff and defendant, memorandum, &c. the ſame is then docketted and filed in the treaſury chamber. On the day mentioned in the rule for the defendant to produce the record, the roll at the treaſury is to be

brought into court, and the paper-book given to one of the cryers, who will call the defendant three times "To produce the record, or he will be condemned," the whole payments four ſhillings and ſix-pence. In the afternoon, if the action be in caſe, judgment is ſigned upon a treble penny ſtamped paper, paying ſix-pence, and the plaintiff may give notice of enquiry, and proceed to execution. But if it is in debt, the judgment is on a double half-crown ſtamp.

If the defendant returns the paper-book, and indorſes thereon "That he has ſtruck out the rejoinder," and left a demurrer in the office, the paper-book is to be taken to the clerk of the papers to have the demurrer and joinder added thereto, and delivered again to the defendant's attorney (and is now called the demurrer-book,) and he muſt return the ſame in "Twenty-four hours," paying for the entries as before, or the plaintiff may ſign judgment, as if no plea had been pleaded. But if he return the book in time, and pay for the ſame, the plaintiff's attorney enters on the roll the term, the warrants of attorney, and the memorandum, as for as the cauſe of the action; the roll is then taken to the clerk of the judgments, who will enter it; a brief muſt be then given to counſel, with inſtructions to move for a *conſilium*, (that is a day appointed to argue the demurrer,) which is only ſigned by him, Fee, ten ſhillings and ſix-pence, the roll is then taken to the clerk of the the papers, who will mark it, "Read," paying one and ſix-pence and ſign the initials of his name on the counſel's brief; the brief is then taken to the clerk of the rules, who will draw up the rule, Rule four ſhillings, which is taken to the clerk of the papers, and he will ſet down the cauſe, paying one ſhillings and ſix-pence. The rule for the *conſilium* need not be ſerved unleſs when it's for argument, but it is commonly expected. Four copies of the demurrer books are then to be made for the judges, (no ſtamps,) two of which are to be delivered by the plaintiff two days before the day of argument, *viz.* one to the chief juſtice, and the other to the ſenior judge; and if the defendant has not left his, before eight in the evening (two days before argument) the plaintiff's

plaintiff's attorney then delivers the other two to the two other judges, paying the clerks each two ſhillings, and in this caſe the defendant is not to be heard, a copy is then made for the counſel, and indorſed on "To move for judgment," Fee one guinea. On the day of argument the plaintiff's attorney is to attend the court, paying the cryers four ſhillings. In the evening the clerk of the rules will draw up the rule for judgment, and if the action be in caſe, the memorandum is to be entered on a treble penny ſtamp paper, and taken to the clerk of the judgments, who will ſign judgment thereon, paying ſixpence. If the action be in debt, the rule muſt be ſtamped with a double half-crown.

The defendant may ſtrike out all the ſpecial pleadings if he pleaſes, and plead the general iſſue, which is often done where there has been no rule to ſtand by the plea ſerved, or when the term is ſo far gone, that the plaintiff cannot give notice of trial.

Where the plaintiff, upon any pleading of the defendant, tenders an iſſue, and the book is made up and delivered with notice of trial, and the defendant ſtrikes out the *ſimiliter*, and returns the book with a demurrer, if judgment be given for the plaintiff on the demurrer, the ſame notice which was given for the trial of the iſſue on the paper-book, ſhall ſerve for executing the writ of enquiry, *R. H.* 8 *G.* 1. but the plaintiff ought to give notice of the hour, and place of executing the enquiry.

A general demurrer cannot be waived, but a ſpecial one may.

Upon delivery of any paper-book, wherein an iſſue is joined, and notice of trial given on the back of the book, if the ſame be afterwards waived, and the general iſſue given, the notice which was given for the trial of the ſpecial iſſue, ſhall ſerve for notice of the general iſſue. *Hil.* 8 *Geo.* 2.

If a paper-book be made up and delivered in term time, or within four days excluſive after the term, with a rule given thereon, by the clerk of the papers, for bringing the ſame book to be inrolled, and the defendant's attorney doth not within four days after the delivery

delivery thereof return the book, and join with the plaintiff in the ſpecial iſſue or demurrer made up, or waive his ſpecial plea, and give the general iſſue or demurrer to any ſpecial iſſue tendered, and pay for entering the pleadings on his part, judgment may be ſigned, as if no plea had been pleaded. *R. Trin.* 1 *Geo.* 2.

But where a plea is not put in in time, ſo that a paper-book may be made and delivered in term, or within four days after; yet if it be made and delivered within eight days after the term, the defendant's attorney muſt take it, and return it again in four days after the delivery, or judgment may be ſigned. *Ibid.*

If a plea be pleaded in term, or in time after the term, and the paper-book is not made up and delivered within eight days excluſive after term, if it be an iſſue to be tried in London or Middleſex, or a demurrer, the other party is not bound to deliver back the book till within the firſt four days of the next term; but if it be an iſſue to be tried at the aſſizes, the defendant's attorney ſhall deliver it back within four days after delivery, and pay for entering his part, and join in the ſpecial iſſue, or give the general iſſue, and take notice of trial, or plaintiff's attorney may ſign judgment by default, as if defendant had not pleaded. But in all caſes, if the plaintiff's attorney accept the book after the limitted time, he cannot ſign judgment. *Ibid.*

All ſpecial cauſes ſet down by the clerk of the papers to be argued, are to be entered at leaſt four days, excluſive of the day of argument, of which notice is forthwith to be given to the attorney or agent on the other ſide; and all ſuch cauſes are to be argued in the order they ſtand entered, and are not to be adjourned by conſent or otherwiſe, unleſs the court ſhall for reaſonable cauſe, verified by affidavit, upon application to be made by either of the parties, their attorney or agent (at leaſt two days before the day of argument) otherwiſe order; and all ſuch cauſes remaining undetermined at the end of any term, ſhall, without any new entry, be continued in the book kept by the clerk

clerk of the papers, to come on the next term in the the order they ſtand. *Mich.* 1756.

Chap. XIII.

Of a Demurrer.

A Demurrer is an iſſue in matter of law, and confeſſes the facts ſtated by the oppoſite party, but denies that by thoſe facts the plaintiff has received any injury in law; or if it be the plaintiff that demurs, denies that the defence made, is in law ſufficient: as if the plaintiff do not aſſign a ſufficient treſpaſs, the defendant demurs to the declaration; or if the defendant pleads the authority of another for ſuch treſpaſs, without making out the right of the perſon giving ſuch authority, the plaintiff may demur to the plea, and ſo in any ſtage of the proceedings, where either party perceives any material objection in point of law whereon he may reſt his caſe. Demurrer.

The demurrer avers the declaration or plea, replication, or rejoinder, to be inſufficient in law to maintain the action or defence, and therefore prays judgment for want of ſufficient matter alledged.

Demurrers are ſometimes for want of form in the writ or declaration; but in exceptions to the form or manner of pleading, the cauſe of demurrer muſt be ſet forth, 27 *Eliz. c.* 5. 4 and 5 *Ann. c.* 16. and either upon a general or ſuch a ſpecial demurrer, the oppoſite party muſt aver the ſufficiency of the pleading demurred unto, which is called a joinder in demurrer, and the parties are then at iſſue in point of law, which iſſue is to be determined by the court, and not by a jury. For want of form.

On a general demurrer to the declaration, the plaintiff may apply to a judge for a ſummons for leave to amend; or may proceed to join in demurrer, and make up the demurrer-book himſelf, a copy of which General.

which he is to deliver to defendant's attorney, charging 4*d. per* ſheet, and duty, and if not paid for on demand, may ſign judgment, *Tr.* 12 *W.* 3. A general demurrer muſt be ſigned by counſel, or the plaintiff may ſign judgment; if the plaintiff joins in demurrer, he may proceed by moving for a *conſilium* for argument, the ſame as on a ſpecial one.

If the defendant be bound by rule of court, or order of a judge, to plead an iſſuable plea, and take notice of trial, and accordingly he pleads an iſſuable plea, and the plaintiff replies, he may notwithſtanding demur to the replication. *Say. Rep.* 88.

A general Demurrer-book on a Demurrer to the declaration.

Michaelmas Term, in the twenty-ſecond year of king George the Third.

General demurrer-book.

London to wit. } Be it remembered, that on Wedneſday next after the morrow of all ſouls, in this ſame term, before our lord the king at Weſtminſter, comes *William White* by his attorney, and brings into the court of our ſaid lord the king, before the king himſelf, now here, his certain bill againſt *Benjamin Black* being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, of a plea of treſpaſs on the caſe, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, London *(ſs.)* (here the declaration is to be inſerted *verbatim.*) And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury when, &c. and ſaith, that the ſaid declaration, and the matters therein contained, are not ſufficient in law for the ſaid *William* to have or maintain his ſaid action againſt the ſaid *Benjamin*, to which ſaid declaration the ſaid *Benjamin* hath no need, nor is he obliged by the law of the land to anſwer, wherefore for want of a ſufficient declaration in this behalf, the ſaid *Benjamin* prays judgment, and that the ſaid *William* may be barred from having and maintaining his aforeſaid action thereof againſt him, &c.

And

And the ſaith *William*, ſaid that the declaration aforeſaid, and the matters therein contained, are ſufficient in law for the ſaid *William* to have his aforeſaid action thereof maintained againſt the ſaid *Benjamin*, which ſaid declaration, and the matters therein contained, the ſaid *William* is ready to verify and prove as the court ſhall award, and becauſe the ſaid *Benjamin* hath not anſwered the ſaid declaration, the ſaid *William* prays judgment, and his damages by occaſion thereof to be adjudged to him, &c. but becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and concerning the premiſes, a day is given to the ſaid parties, that they be before the lord the king, at Weſtminſter, on next, after to hear their judgment thereon, for that the ſaid court of our lord the king now here is not yet adviſed thereof, &c.

Demurrer to plea.

And the ſaid *William* as to the plea of the ſaid *Benjamin* by him above pleaded ſays, that the plea aforeſaid, in manner and form as the ſame is above pleaded, and the matters therein contained, are not ſufficient in law for the ſaid *Benjamin* to bar the ſaid *William* from having or maintaining his aforeſaid action thereof againſt the ſaid *Benjamin*, and that the ſaid *William* is not under any neceſſity, nor is he bound by the law of the land in any manner to anſwer thereto, and this he is ready to verify; wherefore for want of a ſufficient plea in this behalf, the ſaid *William* prays judgment, and his damages by reaſon of the premiſes to be adjudged to him, &c.

Demurrer to replication.

And the ſaid *Benjamin*, as to the ſaid plea of the ſaid *William*, by him above in reply pleaded to the ſaid plea of the ſaid *Benjamin*, ſaith that the ſaid plea of the ſaid *William*, in manner and form as the ſame is above in reply pleaded, and the matters therein contained, are not ſufficient in law for the ſaid *William* to have or maintain his aforeſaid action thereof againſt him the ſaid *Benjamin*, and that he the ſaid *Benjamin* is not under any neceſſity, nor is he bound by the law of the land in any manner to anſwer the ſame, and this he the ſaid *Benjamin* is ready to verify; wherefore as before he prays judgment, and that the ſaid *William* may be barred from having or maintain-

taining his aforeſaid actions thereof againſt him, &c. for cauſes of demurrer in law, according to the form of the ſtatute in that caſe made and provided, the ſaid *Benjamin* ſets down and ſhews to the court here the following cauſes, to wit, &c.

A copy of the declaration is given to the clerk of the papers, who makes up the paper-book, and gives a four day rule in the margin to receive and return the book, otherwiſe judgment.

If the defendant's attorney returns the book in time, and pays for it, the proceedings are to be entered on the roll, as before directed.

If there is an iſſue as to part, and a demurrer as to the other part, the cauſe may be tried before the demurrer is argued, or the demurrer may be argued before trial; in the latter caſe, all the proceedings are to be entered on the roll which are in the paper-book, and the parties proceed to argument in the ſame manner, as if there was no iſſue in fact, as that is to be tried afterwards.

If the plaintiff refuſes to join in demurrer, a rule is had from the maſter for that purpoſe, which is entered with the clerk of the rules, and on ſervice of that rule, if the plaintiff does not join in demurrer before the rule is out, the defendant may ſign *nonpros.*

If judgment is given on demurrer for the plaintiff, and the action is for damages, the judgment is to be on treble penny ſtampt paper; but if in debt, the rule is ſtamped with a double half-crown.

The defendant cannot waive a general demurrer, and plead the general iſſue; but a ſpecial one may be waived, and the general iſſue may be pleaded, and notice of ſet off given at the ſame time. *Str.* 906.

Where the book may be made up by the defendant.

If the plaintiff demurs in law, or takes iſſue on the defendant's plea, rejoinder, or rebutter, and the defendant in ſuch caſe of a demurrer joins therein, if the plaintiff will not make up the book nor enter it on record, the defendant may do it for him, by getting a rule from the maſter for that purpoſe, "unleſs the plaintiff enters the iſſue on record (upon ſuch a day) let the ſame be entered on the part of the defendant." *R. E.* 11. *W.* 3.

This

This being ſerved on the plaintiff's attorney, if he does not enter the iſſue within the time, the defendant's attorney makes a copy of declaration, and takes it to the clerk of the papers, who will make up the book, which is to be delivered to the plaintiff's attorney, and the defendant's attorney proceeds the ſame as if his client was the plaintiff in the cauſe.

Copies of a demurrer-book muſt be delivered two days at leaſt before the argument comes on, and the attorney for the plaintiff delivers the copies to the chief juſtice and ſenior puiſne judge.

If the one party delivers all the paper-books, the other ſhall pay the charges of two of them before judgment, or it ſhall be allowed in taxation of coſts. Or if there ſhall be no taxation of coſts, the attorney for the defaulter ſhall be compelled to pay by attachment.

If the defendant demurs to the declaration, his attorney ſhall accept notice of executing a writ of enquiry, on the back of the joinder in demurrer. And if the defendant pleads a dilatory plea, to which the plaintiff is obliged to demur, his attorney ſhall accept ſuch notice on the back of the demurrer.

If the defendant demurs as to part, and takes iſſue on the other part, and the plaintiff hath judgment on the demurrer, he may enter a *non pros* as to the iſſue, and proceed to a writ of enquiry on the demurrer; but without a *non pros*, he cannot have a writ of enquiry, becauſe on the trial of the iſſue, the ſame jury will aſſeſs damages on the demurrer. *Salk.* 219. *pl.* 6. On a demurrer as to part, and iſſue as to part, the iſſue generally ſtays until the demurrer is argued.

Of judgement in demurrer.

If the judgment be for the plaintiff, the rule for judgment is to be drawn up with the clerk of the rules; and if the action be ſuch, that the judgment be not final, but only interlocutory, or in damages, as in caſe of treſpaſs, notice muſt be given of executing a writ of enquiry, and ſuch writ muſt be executed accordingly.

But when the judgment in demurrer is final, either the rule for judgment, or the demurrer-book muſt be ſtamped with a double half-crown ſtamp, and the

clerk of the *niſi prius* office, attends the maſter with the rolls, who taxes the coſts, and marks them in the margin, upon which execution may be ſued out.

Chap. XIV.

Of the Iſſue.

AN iſſue of fact, is when the fact only and not the law is diſputed, and when he that denies or traverſes the fact, pleaded by his antagoniſt, has tendred the iſſue thus, "and this he prays, may be enquired of by the country;" or, "of this he puts himſelf upon the country;" it may be immediately ſubjoined by the other party, and the ſaid *C. D.* doth the like;" and then the iſſue is ſaid to be joined, as both parties have agreed to reſt the fate of the cauſe upon the truth of the fact in queſtion, and the iſſue of fact muſt in general be tried, not by the judges of the court, but by ſome other method; the principal of which is, by the country, *per pais*, that is, by jury; which eſtabliſhment of different tribunals for determining theſe different iſſues, is ſomewhat ſimilar to that amongſt the Romans, where the *judices ordinarii*, determined only queſtions of fact, but queſtions of law were determined by the *centum viri*. Cic de Orator, l. 1 c. 38.

Every clerk or attorney of the king's bench, may by the ancient rules of the court, make up iſſues and demurrers in the following caſes, *viz.* Every iſſue that may be given on the book ſide in the office,

Not guilty to a new aſſignment in treſpaſs.

To the bar of *ſon frank tenement.*

Comperuit ad diem to a bail bond.

Nul tiel record to a *ſcire facias*, or action of debt on judgment.

A general demurrer to a declaration.

In covenant where defendant tenders an iſſue to the country.

Every

Every ſpecial *non eſt factum. ſon aſſault demeſne.*
All iſſues and demurrers upon every writ of error, *ſcire facias*, and *audita querela.*
All repleaders.

Iſſue on a general plea of non aſſumpſit; *or not guilty, where the declaration and plea are of the ſame term.*

Trinity term, in the twenty ſecond year of the reign of king George the Third.

London, to wit. } Be it remembered, that on Friday next after the morrow of the holy Trinity, in this ſame term, before our lord the king, at Weſtminſter, comes *William White*, by *A. B.* his attorney, and brings into the court of our ſaid lord the king, before the king himſelf, now here, his certain bill againſt *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of the lord the now king, before the king himſelf, of a plea of treſpaſs on the caſe, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, (here the declaration is to be inſerted *verbatim.*)

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and ſays, that he did not undertake and promiſe in manner and form as the ſaid *William* hath above thereof complained againſt him, and of this he puts himſelf upon the country; and the ſaid *William* doth the like, &c. Therefore, let a jury thereupon come before our lord the king, at Weſtminſter, on * twelve, &c. by whom, &c. and who neither, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid, at the ſame place. Plea.

* The laſt day of the term, if the cauſe is tried the ſittings after term; if in term, the firſt day of the term. If in the country, the laſt day of term.

Iſſue

Iſſue where the declaration and plea are of different terms.

Trinity term, in the twenty-firſt year of the reign of king George the Third.

Middleſex, to wit. } Be it remembered, that in Eaſter term laſt paſt, before our lord the king, at Weſtminſter, came *William White*, by *A. B.* his attorney, and brought into the court of our ſaid lord the king, before the king himſelf, then there, his certain bill againſt *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the now king, before the king himſelf, of a plea of treſpaſs and aſſault, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, (here the declaration muſt be inſerted *verbatim.)*

And now at this day, (that is to ſay) on Friday next after the morrow of the holy Trinity until which day the ſaid *Benjamin* had leave to imparle to the ſaid bill, and then to anſwer the ſame, &c. at which day before our ſaid lord the king, at Weſtminſter, comes as well the ſaid *William* by his ſaid attorney, as the ſaid *Benjamin* by *C. D.* his attorney; and the ſaid *Benjamin* defends the wrong and injury, when, &c. and ſays, that he is not guilty of the premiſes above laid to his charge, in manner and form as the ſaid *William* hath above thereof complained againſt him, and of this he puts himſelf upon the country, and the ſaid *William* doth the like, &c. therefore let a jury thereupon come, &c.

Only one imparlance, is to be entered, even if the plea be of two or three terms ſubſequent to the declaration as the declaration of Michaelmas term, plea of Eaſter, and the cauſe is tried of Trinity; the imparlance may be over to the firſt day of Trinity, and iſſue made as of that term, as the want of a continuance day cannot be aſſigned for error, by *ſtat.* 4 *Ann.*

If two or more iſſues are taken.

Where there are two or more iſſues taken upon the defendant's plea, then after the tender of the laſt iſſue, "and of this he puts himſelf upon the country, and the ſaid plaintiff doth the like," is added, "Therefore as well to try this iſſue as the ſaid other iſſue above joined, let a jury come before our lord the king, at Weſtminſter, on next after twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid, at the ſame place."

Iſſue againſt two defendants, where one lets judgment go by default, and the other pleads.

Iſſue is to be joined at the end of the defendant's plea thus: "and the ſaid *William* doth the like;" and then, "And the ſaid *John* in his own perſon, comes and defends the wrong and injury when, &c. and ſays, nothing in bar or preclusion of the ſaid action of the ſaid *William*, by which the ſaid *William* remains therein undefended againſt the ſaid *John*, for which the ſaid *William* ought to recover his damages by occaſion of the premiſes; but becauſe it is unknown to the court here, what damages the ſaid *William* hath ſuſtained by means thereof; and becauſe it is alſo at preſent unknown to the court here, whether the ſaid *Benjamin* will be convicted of the premiſes upon which the above iſſue is joined, between the ſaid *William* and the ſaid *John* or not; and becauſe it is neceſſary and convenient that there be but one taxation of damages in this ſuit; therefore, let the giving of judgment in this behalf againſt the ſaid *John* be ſtayed until the ſaid iſſue between the ſaid *William* and *Benjamin* be determined, and as well to try the iſſue above joined between the ſaid *William* and *Benjamin*, as to inquire againſt the ſaid *John* what damages the ſaid *William* hath ſuſtained in this behalf; let a jury thereupon come

come before our lord the king, at Weſtminſter, on next after twelve, &c. by whom, &c. and who neither, &c. becauſe as well, &c. the ſame day is given to the ſaid *William* and *Benjamin* at the ſame place.

The jurors are to come from the proper county where the iſſue is triable, 4 & 5 *Ann. c.* 16. but this does not extend to actions on penal ſtatutes.

If the *venue* is in a county palatine, there muſt be an award of a ſpecial *venire* and *mittimus*.

Iſſue in the county palatine of Lancaſter.

Therefore let a jury be made thereof, and becauſe the ſaid iſſue between the parties aforeſaid, ought to be tried by men of the county palatine of Lancaſter, to wit, of the body of the ſaid county where the writ of our ſaid lord the king doth not run, and not elſewhere; therefore to try the iſſue between the parties aforeſaid above joined, let the record of the plaint aforeſaid be ſent to his majeſty's juſtices of the ſaid county palatine of Lancaſter, ſo that the ſame juſtices, by his ſaid majeſty's writ of that county, to be duly made out, and to the ſheriff of the ſame county directed; do command the ſame ſheriff, that he cauſe twelve good and lawful men, of the body of the ſaid county of Lancaſter, to come before the ſaid juſtices, at their next general ſeſſion of aſſize to be holden for the ſaid county, after the ſaid record ſhall be delivered to them, each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. and when the verification and iſſue aforeſaid ſhall be there made and tried, that then the ſaid juſtices ſhall ſend the record of the plaint aforeſaid, together with every thing that ſhall be done thereupon, before them, in his ſaid majeſty's court there, to our ſaid lord the king at Weſtminſter, at a certain day which the ſaid ſaid juſtices ſhall appoint, the ſaid parties to be in the ſame court, there to hear judgment thereupon.

With

Welch iſſue.

In a Welch iſſue, to be tried in the next Engliſh county, the award of the *venire* is in this form:

And becauſe the iſſue aforeſaid, between the parties above joined, ought to be tried by men of the next Engliſh county to the ſaid county of Carmarthen, and not elſewhere. And becauſe the county of Hereford is the next Engliſh county to the ſaid county of Carmarthen, therefore let a jury of the ſaid county of Hereford, &c. come before our lord the king at Weſtminſter, on next after who neither, &c. to recognize, &c. the ſame day is given to the ſaid parties there, &c. *Venire* in Welch iſſue.

In a Welſh iſſue, when tried in the next Engliſh county, the *jurata*, *venire* and *diſtringas*, are the ſame as if the *venue* was laid in that Engliſh county.

If the ſheriffs are parties to the ſuit, at the end of the *ſimiliter*, is added: And becauſe it is ſuggeſted to the court of our lord the king, now here, that the ſaid *Thomas Skinner* and *Barnard Turner* are ſheriffs of the city of London, it is therefore commanded to the coroner, that he cauſe to come before our lord the king, at Weſtminſter, on next, after twelve, &c. The *venire* and *diſtringas* are returned by the coroner, paying him four ſhillings and four-pence if common; if ſpecial, eight ſhillings and eight-pence.

Theſe iſſues are to be engroſſed on treble penny ſtamped paper, and the attorney charges four pence *per* ſheet for the copy, beſides ſtamps; and if not paid for on demand, the plaintiff may ſign judgment. *Trin.* 12 *W.* 3.

If the plaintiff's attorney delays to enter the iſſue, a rule is had from the maſter, on the back of the iſſue delivered, and entered with the clerk of the rules, paying one ſhillings and ten-pence, and on ſerving the plaintiff's attorney with a copy, "*White*, v. *Black*, Tueſday next after the octave of the Purification, to enter the iſſue," he muſt before the rule is out, enter the iſſue on record, and file the ſame in the treaſury; or

the defendant may ſign a *non pros* for want thereof. *Mich* 4 *Ann.*

But if the plaintiff wants time, he may apply to a judge for a ſummons for that purpoſe, who will grant him a reaſonable time to enter the iſſue.

If the action be laid in London, or Middleſex, the defendant ought not to give a rule to enter the iſſue the ſame term iſſue is joined, unleſs notice of trial hath been given, and, in a country cauſe, the plaintiff is not bound to enter his iſſue the ſame term: therefore the defendant cannot have a rule for that purpoſe till the next term. *Trin.* 12 *W.* 3.

Chap. XV.

Of giving notice of trial.

Notice of trial.

NOTICE of trial is to be in writing, and if the defendant lives within forty miles of London, eight days notice muſt be given, excluſive of the day it is given; if above forty miles, ten days at leaſt excluſive muſt be given, if the *venue* is laid in the country. *ſtat.* 14 *Geo.* 2. *c.* 17. *ſec.* 4. *Rule, Mich.* 4 *Ann.*

If notice of trial be given on the twenty-ſecond day of February for the next aſſizes, and the commiſſion-day is the fourth of March, it is good, as the one day is to be incluſive, and the other excluſive.

But if the *venue* is laid in London or Middleſex, and the defendant reſides above forty computed miles, then fourteen days notice muſt be given, excluſive. *Rule, Mich.* 1654. 2 *Bar.* 238.

Notice of trial in London, or Middleſex, are to be excluſive of the day it is given, as for inſtance, if the term ends the twelfth day of February, and the ſitting in London after term is the fourteenth, the ſixth of February is a good notice.

If

If the cauſe has ſtood ſtill four terms, without proſecution, after iſſue joined, there muſt be a term's notice of trial, which notice muſt be given before the *eſſoign day* of the fifth, or other ſubſequent term, *Str.* 1164. a judge's ſummons, if no order made, is no proceeding; but a notice of trial, tho' countermanded, is. If the cauſe has been hung up by the defendant, by injunction, then, it being his delay, the plaintiff may proceed without a term's notice.

Sunday is to be accounted a day in ſuch notice, ſo it be not on the day on which the notice is given. *Mod. Caſ. in L. and E.* 21.

If the defendant applies to put off the trial for the want of a material witneſs, notice muſt be given of the motion for that purpoſe, and an affidavit, (which ſhould be made by defendant himſelf,) of ſuch witneſs being a material witneſs.

Affidavit to put off trial.

In the king's bench.

Between *William White*, plaintiff,
againſt
Benjamin Black, defendant.

Benjamin Black of, &c. the defendant in this cauſe, maketh oath, and ſaith, that the iſſue was joined in this cauſe, this preſent Hilary term, and that notice of trial was given for the laſt ſittings within the ſaid term; and this deponent further ſaith, that *Richard Red*, late of, &c. is a material witneſs for him, this deponent, in the ſaid cauſe, as he is adviſed and believes to be true, and that he cannot ſafely proceed to the trial thereof, without the teſtimony of him the ſaid *Richard Red*. And this deponent further ſaith, that he hath endeavoured to find out the ſaid *Richard Red*, and that he hath been to the houſe of the ſaid *Richard Red*, and was informed, that he was gone to Carliſle, in the county of Cumberland; and that he, this deponent, hath ſent there, for the purpoſe of ſubpœnaing him, but that the ſaid *Richard Red* is gone from thence, as this deponent hath heard, and verily believes

to be true; and that he, this deponent cannot get any information where the ſaid *Richard Red* now is, but is informed, by the ſervants of the ſaid *Richard Red*, that he will be at home in one mouth. And that he, this deponent, hopes and expects to be able to procure the preſence of the ſaid *Richard Red* within the firſt ſittings of next Eaſter term.

This is a rule to ſhew cauſe, fee to counſel 10*s*. 6*d*. and the rule muſt be drawn up and ſerved on the defendant's attorney, and on affidavit of ſuch ſervice, the court make the rule abſolute, if no cauſe ſhewn on the appointed day.

The affidavit to put off the trial, for want of witneſſes, muſt ſhew ſuch witneſſes to be abſent, and material, and that the defendant cannot go ſafely to trial without ſuch evidence; and that he has hopes and expectation of procuring the preſence of ſuch witneſſes within a reaſonable time; (ſpecifying it) and that there has been no laches, or neglect, to procure their teſtimony. 4 *Burr.* 1514.

Notice of trial for London.

"Take notice that this cauſe will be tried, the ſittings after this preſent Trinity term, to be held at the Guildhall of the city of London, Your's, &c.
A. B. plaintiff's attorney."

At Weſtminſter.

"To be held at Weſtminſter-hall, in the county of Middleſex."

At the ſittings within term.

"The firſt ſittings within the next Trinity term, to be held at," &c.

In the country.

"The next aſſizes, to be held at York, in and for the county of York."

Countermand

Countermand of notice of trial.

Countermand.

Muſt be in writing, and if the action be laid in London or Middleſex, and the defendant lives within forty miles of London, two days, excluſive of the day in which the countermand is delivered, are ſufficient; but if the *venue* be laid in the country, ſix days are to be given, at leaſt, before the intended trial; or if the *venue* be laid in London or Middleſex, and the defendant lives above forty miles from London, ſix days, at leaſt, muſt alſo in that caſe be given. *Stat.* 14 *G.* 2. *c.* 17. *Rule, Mich.* 4 *Ann.*

Countermand of notice of trial.

"*White* v. *Black.* I hereby countermand the notice of trial given you in this cauſe, Yours, &c.
A. B. plaintiff's attorney."

This countermand is be ſerved on the defendant's attorney.

Continuance of the notice of trial.

This is only given in London or Middleſex, which the plaintiff may do, as for inſtance, if the plaintiff give notice of trial for the firſt ſitting in term, he may, by giving notice, continue his notice of trial for the ſecond or third ſittings or the ſittings after term; but it cannot be continued more than once in a term, *Str.* 1119. one day's notice of continuance ſufficient.

Notice of continuance.

"I hereby continue the notice of trial in this cauſe to the ſittings after this preſent Hilary term. Dated, &c.

Of coſts for not proceeding to trial.

If the plaintiff does not proceed to trial, or give a countermand in time, the defendant on affidavit of attendance, and of the neceſſary expences, ſhall have his

his coſts taxed. *Mich.* 1654. *ſ.* 18. But the court will not ſtay the trial for not paying them (except in ejectment,) becauſe the defendant hath another remedy to recover them.

A pauper ſhall not pay coſts for not going to trial, *Str.* 983, 420. but the plaintiff may move to diſpauper him. *Str.* 983.

As the defendant is intituled to coſts for not going to trial, if the plaintiff does not proceed to trial purſuant to his notice, the defendant may move the court for the coſts, upon an affidavit ſtating the term in which the action was commenced in which iſſue was joined, and the time that notice of trial was given thereon, and for when and that the plaintiff did not proceed to the trial thereof, nor did he countermand the ſaid notice of trial.

A copy of this affidavit is to be given to counſel, with fee, one guinea, who will move for a rule, by which it will be referred to the maſter: the rule muſt be drawn up the ſame at the clerk of the rules, paying 5*s.* and an appointment had thereon from the maſter to tax the coſts; and if they are not paid, a demand muſt be made by the defendant, or his attorney, on the plaintiff, and if he neglects to pay, on affidavit of ſuch demand and refuſal, the defendant may move for an attachment, which is abſolute in the firſt inſtance.

N. B. The rule is made to be paid to defendant, or his attorney.

Notice muſt be given of this motion, and an affidavit made of the ſervice of ſuch notice.

On notices of trial the diſtance from London is taken by computed miles, and not by meaſurement. *Stra.* 1216.

Eight days notice of trial was held bad; and the verdict obtained by the plaintiff, without defence, was ſet aſide, the place of the defendant's abode being in Ireland. *Barnes* 297.

At the back of the iſſue was written, "Take notice of trial at the next aſſizes;" and though there was no date, or county, or attorney's name mentioned, yet it being indorſed on the back of the iſſue,

iſſue, the court held it good; but that it would not be ſo on a ſeparate paper. *Henbury* v. *Roſe*, *Stra.* 1237.

Notice of trial upon the iſſue ſhall ſerve for notice of executing a writ of enquiry, if the book is returnhe with a demurrer, *Hil.* 8 *Geo.* 1. but then the plaintiff ought to give notice of executing the enquiry.

Proceedings had been ſtayed for twelve months, and the plaintiff afterwards, on the firſt day of Hilary term, gave notice of trial for the aſſizes. The plaintiff had a verdict, which the defendant moved to ſet aſide, and obtained a rule, *niſi*, which was afterwards made abſolute, becauſe the notice was not given before the eſſoign day.

It was ſaid in *Harvey* and *Potter*, 1 *Stra.* 211. That upon an old iſſue if notice of trial be given before the firſt day, in full term, it is ſufficient, and that it need not be given before the eſſoign day. But in *Begg* v. *Roſe*, it was ſettled (upon conſideration) that where a term's notice is required on an old iſſue, the notice muſt be given before the eſſoign day, and that is a full term.

The court, on motion for a new trial, held, that the giving notice of trial half a year after iſſue joined, would prevent the neceſſity of giving a term's notice, till a year after the laſt notice was given and countermanded. *Stra.* 531.

Uſual notice is ſufficient, where the delay has been for a year after iſſue joined by an injunction out of chancery, at the ſuit of the defendant. 1 *Sid.* 92.

Notice of trial is neceſſary, though the trial is put off by rule of court, to aſcertain the day. 2 *Blackſt. Rep.* 798.

If the defendant in any action in London or Middleſex enters a *ne recipiatur*, to prevent the plaintiff from trying the cauſe at that ſitting, the plaintiff may proceed to trial at the next ſitting, on notice given during the firſt ſitting *Mich.* 4 *Ann.*

So if notice of trial be given, for a day certain, in London or Middleſex, and the plaintiff is not ready to

to proceed, the cauſe may be tried at the next ſitting, on the like notice, and in either caſe, if the cauſe be not tried at ſuch next ſitting, notice is to be given as at firſt, unleſs it be made a *remanet*.

Notice of trial muſt be given to the attorney or agent in town, but where on an old iſſue, it was given to an attorney in the country, it was held good.

Short notice of trial, is two days. *Pract. Reg.* 390.

The cauſe was tried on a day to which it was continued by a ſecond countermand, and the defendant making no defence, the verdict was ſet aſide, it being only in the plaintiff's power to continue his notice once in a term *Stra.* 1119.

If the plaintiff gives notice, but does not proceed to trial, whereby coſts are taxed for the defendant, and afterwards gives freſh notice, perhaps with deſign to put the defendant to further coſts, yet the court will not ſtay the trial till the firſt coſts are paid (except in ejectment) becauſe the defendant hath a remedy for them; and if the plaintiff ſhould not try his cauſe, purſuant to the ſecond notice, the defendant will again have coſt, and the like remedy to obtain them. 1 *Sid.* 279. and 17 *Salk.* 255. *Lord Raym.* 697.

An affidavit in the common form may be ſufficient to put off a trial, where no cauſe of ſuſpicion appears; but where there is cauſe of ſuſpicion, it may, in ſome caſes be neceſſary to ſatisfy the court, that the perſons abſent are really material witneſſes; and that there has been no neglect to procure their teſtimony; and that there is a reaſonable expectance of their future attendance. *Burr.* 4 *pt.* 1514.

On motion to put off a trial, the court ſuffered affidavits taken before a vice-conſul, abroad, to be read. Such affidavits are conſtantly received and read at the council-board. It is not reaſonable to expect ſuch ſort of affidavits ſhould be taken before commiſſioners. *Barnes* 466

Affidavit

Affidavit of demand or refusal.

C. D. of, &c. attorney for the defendant in this cause, maketh oath and saith, that he did personally serve the above named plaintiff with a true copy of the rule, and the master's *allocatur* thereon, hereto annexed; and that he this deponent at the same time did demand the costs allowed by the master on the said rule, but that the said plaintiff did not then, or at any time since, pay the same to this deponent.

Sworn, &c.

Counsel's fee, on making rule absolute, is one guinea, the rule when drawn up must be taken to a clerk in court, at the crown-office, who will make out attachment, paying 16*s.* on which the warrant is to be had, and given to an officer; his fee is one guinea.

Chap. XVI.

Of judgment as in case of a nonsuit.

FORMERLY if the plaintiff did not proceed to trial; after issue joined, the defendant was (after a rule given to the plaintiff to enter his issue, and he had done it in pursuance thereof) obliged to have a further rule for a record to be made by proviso, if the plaintiff had made default, but the stat. 14 *Geo.* 2. *c.* 17. has given leave for the defendant to apply to the court for leave to enter up judgment as in the case of a nonsuit, for not proceeding to trial pursuant to notice given: notice must be given to the plaintiff's attorney before application; thus the defendant may the next term, after issue joined, (the same not being before entered on record), get a rule from the master to enter the issue on record, which is indorsed on the back of the issue, and entered with the clerk of the rules, paying 1*s.* 10*d.* a copy of this rule is to be served on the plaintiff's attorney; when the rule is

expired, ſearch muſt be made at the clerk of the judgments, if the iſſue is entered and docketted, if ſo, then notice muſt be given of the motion (naming the cauſe.)

Notice of motion for judgment as in caſe of nonſuit.

In the king's bench.

Between *William White*, plaintiff,
and
Benjamin Black, defendant.

Take notice that this honourable court will be moved on next or ſo ſoon after as counſel can be heard, that the like judgment may be awarded for the defendant herein, as in caſe of a nonſuit for default of the plaintiff in not proceeding to trial in due time after iſſue joined. Dated.

Yours, &c.

C. D defendant's attorney.

This notice muſt be ſerved on the plaintiff's attorney, and an affidavit made of ſuch ſervice.

Affidavit.

In the king's bench.

Between *William White*, plaintiff,
and
Benjamin Black, defendant.

C. D. of &c. attorney for the defendant in this cauſe, maketh oath and ſaith, that iſſue was joined in this cauſe, in Hilary term laſt paſt, and notice of trial was given for the ſittings after the ſaid term; and that the ſaid plaintiff did not proceed to the trial thereof purſuant to his ſaid notice; and this deponent further ſaith, that he did perſonally ſerve Mr. *A. B.* the plaintiff's attorney, with a notice, purporting, that this honourable court be moved (to-morrow) " (or this day) " or ſo ſoon after as counſel could be heard, that the like judgment might be given for the ſaid defendant, as in the caſe of a nonſuit purſuant to the ſtatute.

Sworn, &c. *C. D.*

This affidavit muſt be given to counſel, Fee, half a guinea, and the roll muſt be brought into court, or before the ſitting of the court, it may be marked in the treaſury, "Read," paying one ſhilling and ſixpence; in the evening the rule muſt be drawn up, paying five ſhillings and ſixpence, a copy of the rule muſt be ſerved on the plaintiff's attorney, and affidavit made of the ſervice, on which affidavit the counſel may move to make the rule abſolute the next day, after the day for ſhewing cauſe.

On the part of the plaintiff, it is neceſſary for him to ſhew ſome reaſonable excuſe why he did not proceed to trial, ſuch as the abſence of a material witneſs, &c. but in general, undertaking peremptorily to try the cauſe at the next ſittings, or next aſſizes, is ſufficient after the firſt notice only; after two notices, the court will expect a real excuſe, as they will after the firſt notice in penal actions.

The party muſt not only ſhew the abſence of a material witneſs, but he muſt be named, and that all endeavours were uſed to find him out, and that he is expected home ſoon, naming the time, and if the court put it off, it is only from term to term.

If the defendant makes the rule abſolute, it is drawn up at the clerk of the rules, paying ſix ſhillings, and judgment ſigned on a double half-crown ſtamped paper, entering thereon only the memorandum of the iſſue, the roll is carried in, therefore there is no neceſſity for a new one, but the roll muſt be had from the treaſury, or the maſter to mark the coſts, paying in term-time one ſhilling and ſixpence, in vacation eleven ſhillings and eight-pence more for the keys of the treaſury.

On application to the court for the award of judgment, as in caſe of a nonſuit, the plaintiff ſometimes undertakes to try his action within ſuch time as the court ſhall allow him, which is always made a part of the rule.

The ſtatute 14 *Geo.* 2. *c.* 17. does not extend to a writ of right, ſo as to give coſts to a tenant on a

judgment, as in caſe of a nonſuit. *Newman* v. *Goodman, Blackſt. Rep.* 1093.

Judgment, as in caſe of a nonſuit, moved for on an affidavit of notice of motion only. On ſhewing cauſe it was objected, that to ſupport the rule, there ſhould have been an affidavit, that the cauſe was not tried. Objection allowed, and rule diſcharged.

Executors and adminiſtrators pay coſts for not going to trial, purſuant to notice given by them. *Burr. Rep.* 4 *pt.* 1585. ſo of a *non pros*; but not if nonſuited at the trial. *Cro. Jac.* 225.

Where an executor can bring an action in his own right, and brings it as executor, if he fails he ſhall pay coſts.

A rule, *niſi*, in a *qui tam* action, for judgment, as in caſe of a non ſuit was made abſolute, no cauſe being ſhewn. 1 *Wilſ.* 225.

A common informer may be nonſuited, and a *qui tam* action is within the ſtatute. *Barnes* 315.

Motion for judgment, as in caſe of a nonſuit, and that the maſter ſhould tax coſts for not going to trial according to notice not countermanded, refuſed, for coſts in both caſes being founded in different rights ought not to be blended. *Earl of Leiceſter* v. *Wooden, Mich.* 21 *Geo.* 2.

In replevin, the court of king's bench held, that the defendant ought never to have judgment, as in caſe of a nonſuit, becauſe as he himſelf is an actor, he might have tried the cauſe. *Sayer on Coſts*, 142.

But the common pleas held otherwiſe. *Bently* v. *Scott, and another, Barnes* 317.

Chap. XVII.

Of a trial at bar, ſpecial jury, and view.

AFTER iſſue joined, and not before, either party may move to have a trial at bar, which muſt be by ſpecial jury, (but this cannot be had in London, the citizens not being to be brought out of the city,) nor is a trial at bar allowed in iſſuable terms; in general it is granted either upon the value of the lands, or the difficulty of the title, for which reaſon the court will not grant them till iſſue joined, 12 *Mod.* 331. nor can they be granted, though the parties conſent, without leave of the court. *Str.* 696

The moſt proper caſe for a trial at bar is, where it appears thata queſtion of law, of ſome nicety, will ariſe, and that this will be ſo complicated with aqueſtion of fact, that the whole matter muſt be determined by the jury, under the direction of the court. *Trin.* 4 *eo.* 3. *Whitaker* v. *Burrow, C. B.*

The particular value or difficulty in the caſe muſt be ſhewn, for that it is not enough to ſwear generally, that there is value or difficulty therein. 1 *Barn.* 141. *Str.* 52. 472. If either of the parties wiſh to have a ſpecial jury, a brief is given to counſel for that purpoſe, which is done on a ſlip of paper, and ſigned by him, Fee, ten ſhillings and ſixpence; this brief is to be carried to the clerk of the rules, who draws up the rule, Rule, five ſhillings, an appointment thereon is had at the maſters, and a copy of the rule and appointment ſerved on the oppoſite attorney, and on the deputy ſecondary, if in London or ſheriff if in Middleſex, or in any other county, who will attend the maſter with the freeholder's book, and he, in preſence of both parties names thereout forty-eight, paying him two pounds, two ſhillings, ſheriff two pounds, two ſhillings; when this is done, the maſter's clerk makes out the liſt of the forty-eight;

paying

paying five ſhillings; an appointment is then had from the maſter; to ſtrike out twelve of each ſide a copy of the rule, and appointment is then to be ſerved on the oppoſite attorney, (the ſheriff having nothing further to do) on which the attornies on both ſides attend the maſter, and name on each ſide, one by one, the perſons to be ſtruck out; this being done, the clerk makes copies of the remaining twenty-four, which is to be returned to try the iſſue, a ſpecial *diſtringas* iſſuing for that purpoſe. In London he that ſtrikes the jury chuſes his own officer, though the plaintiff iſſues the *diſtringas*. In ſtrictneſs, if the defendant moves for the jury, he ought to ſue out the *diſtringas*.

In ſome actions, ſuch as treſpaſs or caſe for nuiſances, a view of the jurors may be requiſite, which by the *ſtat.* 4 *Ann. c.* 16. is to be taken by the ſheriff at the expence and coſts of both parties, a counſel's hand in this court is ſufficient for the rule, which rule when drawn up, muſt ſet forth the names of the ſhewers on the part of the plaintiff and defendant, and the houſe where the jurors are to meet, with the day and hour; a copy of this rule is to be ſerved on the oppoſite attorney, and the original left with the ſheriff, with the names of the jurors, and he will ſummon the jury, paying him 2*l.* 2*s.* and his fee for attendance on the jury is 1*l* 1*s.* and no evidence is to be given on the view, but the premiſes only are to be ſhewn. In town, it is not uſual to treat the jury as heretofore with dinners, but in the country it is, and at the expence of both parties.

The proceeding is the ſame as if it were by a common jury, and there is a view.

No coſts for a ſpecial jury are to be allowed the party who moves for it, unleſs the judge certifies that the cauſe was proper to be tried by one. By 21 *Geo.* 2. *c.* 18. which enacts that "The perſon or party who ſhall apply for a ſpecial jury, ſhall not only pay and bear the fees for ſtriking ſuch jury, but ſhall alſo pay and diſcharge all the expences occaſioned by the trial of the cauſe by ſuch ſpecial jury, and ſhall not have any further or other allowance for the

the ſame, upon taxation of coſts than ſuch perſon or party would be intitled unto, in caſe the cauſe had been tried by a common jury, unleſs the judge before whom the cauſe ſhall be tried, ſhall immediately after the trial certify in open court under his hand, upon the back of the record, that the ſame was a cauſe proper to be tried by a ſpecial jury."

And by the ſame ſtatute it is enacted, "That no perſon that ſhall ſerve upon a ſpecial jury, or be returned, ſhall be allowed or take for ſerving on any ſuch jury, more than the judge who tries the cauſe ſhall think reaſonable, not exceeding one guinea; excepting cauſes where a view hath been directed on a motion for a ſpecial jury.

No notice of motion or affidavit of facts is neceſſary.

Motion in common pleas for a ſpecial jury as of courſe, but before the rule was drawn up, the ſecondary doubting, prayed the direction of the court, and it appearing that common jury, proceſs had been awarded, iſſued, and returned, and that the cauſe ſtood as a *remanet* in the chief juſtice's paper, the court refuſed to grant a ſpecial jury, though in country cauſes between aſſizes and aſſizes, the practice is otherwiſe. *Barnes* 461. So after a *venire facias*, and return filed, the court held a motion for a ſpecial jury too late. *Clarke* v. *Shepherd*, *Barnes* 449.

Rule for a view.

White, v. *Black.* } It is ordered that there iſſue a writ of a *diſtringas juratores*, to be directed to the ſheriff of Suſſex, containing a clauſe, directing the ſaid ſheriff to cauſe ſix or more of the jury impanelled and returned, to try the iſſue between them whom the ſaid parties ſhall mutually chooſe to take a view of the place in queſtion, before the day of the trial of the ſaid iſſue, to wit, on the day of next and by conſent of both parties, it is further ordered that *Richard Red*, yeoman, on the part of the plaintiff, and *George Green*, yeoman, on the part of the defendant, ſhall attend the ſame day and ſhew the ſaid place

place to ſuch of the jury as ſhall be choſe to view the ſame, and that the expence of the ſaid view ſhall be equally borne by both parties, and no evidence on either ſide ſhall be given at the time of taking the ſaid view. *By the court.*

On the motion of Mr.

Diſtringas juratores, for a view. } George the third by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, to the ſheriff of Suſſex greeting, we command you, that you diſtrain the ſeveral perſons named in the panel annexed to the writ, the jury ſummoned in our court before us, between *William White* plaintiff, and *Benjamin Black* defendant, by all their lands and chattels in your bailiwick, ſo that neither they nor any one by them intermeddle therewith, until you ſhall have another proceſs thereon from us, ſo that you may have their bodies before us at Weſtminſter, on Wedneſday after the morrow of All Souls, or before our juſtice aſſigned to take the aſſizes in your county, if they ſhall firſt come on Monday the ſecond of September, at Horſham, in your county, according to the form of the ſtatute in ſuch caſe lately made and provided, to make a certain jury of the county, between the parties aforeſaid, of a plea of treſpaſs, and to hear their judgment thereupon of many defaults. And in the mean time according to the form of the ſtatute in ſuch caſe lately made and provided, we command you that you have ſix of the firſt twelve of the ſaid jurors, or any greater number of them, at the place in queſtion, on the twentieth day of Auguſt, next enſuing, who ſhall then have view of the ſaid place, in the preſence of *Richard Red*, on behalf of the plaintiff and *George Green*, on behalf of the defendant appointed by our court before us, to ſhew the ſaid place to the ſaid jurors, and that in what manner you ſhall execute this our precept, you ſhall make return to us at Weſtminſter, and to our juſtices at the ſaid aſſize, remitting to us, this our writ.

Witneſs, &c.

Rule

Rule for a view on the face of the declaration (which was obſtructing a water-courſe) denied it, is never granted without an affidavit in any caſe except an action of waſte. *Barnes* 467.

Chap. XVIII.

Of the record of Niſi Prius.

THE *niſi prius* roll or record contains the whole pleadings, and is to be ingroſſed fairly on a double half-crown ſtamp parchment, and is now made up by the attornies themſelves, though formerly by the clerks in court. In every record to be made up, there muſt be two *placitas*, the one preceding the iſſue, which is to be of that term the iſſue is joined, the other the term the cauſe is to be tried. If the iſſue and record be tried of the ſame term then the two *placitas* are to be of that term.

If on a plea in abatement, a *reſpondeas ouſter* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet the plea muſt be entered on the *niſi prius* record, or it is good cauſe for judgment to be arreſted; for as it muſt be entered on the plea roll, (which is in court,) ſo it muſt be mentioned on the *niſi prius* record, otherwiſe it will not appear to have been a verdict in the ſame cauſe. *Lord Raym.* 329.

If there be a demurrer to any of the pleadings, and the cauſe is to be tried before or after, that be diſpoſed of, all the proceedings muſt be entered on the *niſi prius* record, the ſame as made up in the paper-book.

The Record.

Pleas before our lord the king, at Weſtminſter, of (the term in which the iſſue is joined,) in the twenty-ſecond year of the reign of our ſovereign lord George the third, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, and in the year of our Lord 1782—*Roll.*

Stormont and *Way.*

Surry, to wit. } Be it remembered (here the memorandum, and the whole iſſue from the plea roll muſt be copied *verbatim*, to the end of the award of the *venire* and day given; then the ſecond *placita*.)

Pleas before our ſovereign lord the king, at Weſtminſter, of the term of the holy Trinity, in the twenty-ſecond year of the reign of our ſovereign lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. in the year of our Lord, 1782.

Surry, to wit. } The jury between *William White*, plaintiff, and *Benjamin Black*, defendant, of a plea of is, reſpited before our lord the king, at Weſtminſter, until Saturday next after the morrow of All Souls, unleſs his majeſty's juſtices aſſigned to hold the aſſizes in the county aforeſaid, ſhall firſt come on Thurſday the 26th day of July, in the ſaid county, according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; therefore let the ſheriff have the bodies of the ſaid jurors, to make the ſaid jury, between the parties aforeſaid, of the plea aforeſaid, accordingly the ſame day is given to the parties aforeſaid, at the ſame place. And be it known, that the king's writ on record was delivered to the deputy ſheriff of the ſaid county, on the 18th day of June, in this ſame term, before our lord the king, at Weſtminſter, to be executed according to law, at his peril.

If the cauſe be a town cauſe, and is to be tried either at Weſtminſter or Guildhall, the *jurata* will be as follows:

Middleſex, to wit. } The jury between *William White*, plaintiff, and *Benjamin Black*, defendant, in a plea of is reſpited before our lord the king, at Weſtminſter, until, &c. (a day after the firſt return of the next term) unleſs the king's right truſty and well beloved *William* earl Mansfield, his majeſty's chief juſtice, aſſigned to hold pleas before the king himſelf,

himſelf, ſhall firſt come on (the day of the ſittings) at Weſtminſter-hall in rhe ſaid county, according to the form of the ſtatute in ſuch caſe made and provided, and the ſame day is given to the parties aforeſaid, at the ſame place.

If the trial is in London the record expreſſes inſtead of Weſtminſter-hall, the Guildhall of the city of London.

When the ſuit is by original, there is no memorandum in the beginning, as when by bill.

If the cauſe is to be tried in London or Middleſex, within the term, it muſt be entered in the marſhal's book two days before the ſitting, otherwiſe a *ne recipiatur* may be entered by the defendant. *Hil.* 15 & 16 *Car.* 2.

In Middleſex, no record of *niſi prius* will be received at any ſitting after term, unleſs the ſame ſhall be delivered to, and entered with the marſhal within two days after the laſt day of every term.

And in London, no record of *niſi prius*, will be received at any ſitting after term, unleſs the ſame ſhall be delivered to, and entered with the marſhal the day before the day to which the ſittings in London ſhall be adjourned, by nine in the evening.

If the cauſe is to be tried at the ſittings after term, a *ne recipiatur* cannot be entered, until after proclamation made, by order of the chief juſtice, for the attornies to bring in their records, and if not brought in, a *ne recipiatur* may be entered.

Every cauſe to be tried at *niſi prius*, in London and Middleſex, ſhall be tried in the order in which it is entered, beginning with *remanets*, unleſs it ſhall be made out to the ſatisfaction of the judge in open court, that there is reaſonable cauſe to the contrary, who thereupon will make ſuch order for the trial of the cauſe ſo put off, as to him ſhall ſeem juſt. *Mich.* 17 *Geo.* 2.

If the plaintiff be hindred from trying his cauſe, by the defendant's entering a *ne recipiatur*, the plaintiff may try it the next ſittings, if in London or Mid-

dleſex, upon giving notice to the defendant, or his attorney, on the day on which it ſhould have been tried before the riſing of the court. *Mich.* 4 *Anna.*

If the cauſe is not tried the day of the ſittings, it is then made a *remanet* by the marſhal of courſe, paying him 5*s.* the return of the *diſtringas* is then to be altered to the day after the next ſittings; and the *diſtringas* reſealed, paying 1*d.* and again annexing it to the record, as the ſheriff doth not return a new pannel, nor is there a new ſtamp.

When the record is engroſſed, an *incipitur* is made of the iſſue on a king's bench roll, firſt entering thereon the term the iſſue is joined, warrants of attorney for plaintiff and defendant, and part of the memorandum of the iſſue; the iſſue and record are then to be taken to the clerk of the judgments, in the king's bench office, who enters the iſſue, marks the roll, record, and iſſue paper. Paying him 3*s.* 6*d.* for entering the iſſue if it doth not exceed ten ſheets, and 1*s.* for every ſix more.

The record being ready to be ſealed, muſt be carried to the *niſi prius* office, where it is examined, ſealed and paſſed; for which is paid 7*s.* 6*d.* for the firſt eight ſheets, and 7*s.* for every ſubſequent eight ſheets, and 6*d.* to the ſealer.

No record of *niſi prius* for trial of any iſſue at the aſſizes ſhall be ſealed after the end of three weeks of the iſſuable terms. *Trin.* 31 *Car.* 2.

But now by a judge's order, for which is paid 2*s.* the record may be ſealed at any time before the aſſizes.

For the aſſizes, the iſſue is entered the ſame as before, and the record is paſſed at the ſame office, with the clerk of the circuit in which the cauſe is to be tried. The *venire* muſt be returned with the under-ſheriff of the proper county, paying him 2*s.* 6*d.* then the *diſtringas* and *venire* are to be annexed to the record, and the writ and record are to be entered together, before the firſt ſitting of the court, after the commiſſion-day except in the counties of *York*, and *Norfolk*, and there to be delivered, and entered with the marſhal,

ſhal, before the firſt ſitting of the court, on the ſecond day after the commiſſion-day. *Trin.* 10 & 11 *Geo.* 2. *Hil.* 14 *Geo.* 2. Fee for entering the record is 14*s.* 8*d.*

The *ſimiliter* was left out in the iſſue delivered, though inſerted in the record of *niſi prius*. Verdict without defence; and on a rule to ſet it aſide for the variance, the court was of opinion that no ſtatute of *jeofails* extends to it, it is a material variance, and the defendant relied upon it. Rule to ſet it aſide made abſolute.

No defence was made at trial becauſe of a variance, which was that in the iſſue delivered on a promiſſory note, the name of the indorſor was omitted, though inſerted in the record of *niſi prius*. Rule abſolute to ſet aſide the verdict.

Chap. XIX.

Of the Venire *and* Diſtringas.

BY the ſtatute Weſtminſter 2. 13 *Ed.* 1. *c.* 30. the clauſe of *niſi prius* is directed to be inſerted in the writs of *venire facias*, that is, "that the ſheriff ſhould cauſe the jurors to come to Weſtminſter (or wherever the king's courts ſhould be held) on ſuch a day in Eaſter or Michaelmas terms, *niſi prius*, unleſs before that day the juſtices aſſigned to take aſſizes ſhall come into the county;" by virtue of which the ſheriff returned the jurors to the court of aſſize, which was ſure to be held in the vacation, before Eaſter and Michaelmas terms, and the trial was there had.

But an inconvenience attended this proviſion, for as the ſheriff made no return of the jury to the court at Weſtminſter, the parties were ignorant who they were, until the time of the trial, and therefore were not ready with their challenges or exceptions, for this reaſon it was enacted, 42 *Edw.* 3. *c.* 11. that no

no inqueſts (except of aſſize and gaol delivery) ſhould be taken by writ of *niſi prius*, until the ſheriff had returned the names of the jurors to the court above. So that now in almoſt every civil cauſe the clauſe of *niſi prius* is left out of the writ of *venire facias*, which is the ſheriff's warrant to warn the jury, and inſerted in another part of the proceedings.

For the courſe is to make the *venire* returnable on the laſt return of the term in which iſſue is joined, *viz.* Hilary, or Trinity terms, which from the making up the iſſue therein, are called iſſuable terms, and he returns the names of the jurors in a panel (a little pane or oblong piece of parchment annexed to the writ) this jury is not ſummoned, and therefore not appearing at the day, muſt unavoidably make default, for which reaſon a compulſive proceſs, called a *diſtringas*, is now awarded againſt the jurors, commanding the ſheriff to have their bodies, or diſtrain them by their lands and goods, that they may come by the day appointed, and the entry upon the record is, "that the jury is reſpited through defect of jurors," till the firſt day of the next term, then to appear at Weſtminſter, unleſs before that time, *viz.* on the time of the aſſizes the juſtices of our lord the king, appointed to take aſſizes in that county, ſhall have come to the place for holding the aſſizes.

If the cauſe be tried in London or Middleſex, the proceedings are in a ſimilar manner, as will appear by the following forms;

Venire *and* diſtringas.

The *venire* and *diſtringas* are ſealed only The *diſtringas* returned at the ſheriff's office, paying in Middleſex 14*s.* 8*d.* in London, if common, 4*s.* 4*d.* if ſpecial, 8*s.* 8*d.* and annexed to the record with the panel.

The writ of venire facias.

George the third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith,

faith and ſo forth, to the ſheriff of Middleſex, greeting. We command you, that you cauſe to come before us at Weſtminſter, on next next after (ſome return-day of the term in which iſſue was joined, and before the day of trial, if in a country cauſe, the laſt day of an iſſuable term) twelve free and lawful men of the body of your country, (if on a penal ſtatute, inſtead of the body of your county,) "of the neighbourhood of (the place where the action is laid in the declaration) in your county) each of whom has ten pounds by the year, of lands, tenements or rents, at the leaſt, by whom the truth of the matter may be the better known, and who are in no wiſe a kin either to *William White* the plaintiff, or to *Benjamin Black* the defendant, (the parties muſt be deſcribed as in the pleading) to make a certain jury of the country between the parties aforeſaid, in a plea of treſpaſs on the caſe (or as the caſe may be) becauſe as well the ſaid *Benjamin Black*, as the ſaid *William White*, between whom the contention thereupon is, have put put themſelves upon that jury, and have there then the names of the jurors, and this writ. Witneſs, *William* earl Mansfield, at Weſtminſter, the day of in the twenty-firſt year of our reign.

Stormont and *Way*.

This writ is not ſigned but muſt be ſealed for which is paid 7*d*.

If it is where one defendant lets judgment go by default, and the other pleads to iſſue, after the words, "To make a jury of the country, between the parties aforeſaid," is added "as well to try the iſſue between the ſaid *William White*, and *Benjamin Black*, joined, of a plea of treſpaſs on the caſe, as to inquire what damages the ſaid *William* hath ſuſtained by reaſon of the not performing the ſaid promiſes and undertakings, by the ſaid *Richard Red*, made, as for his coſts and charges by him ſuſtained in this behalf, whereof it is conſidered that the ſaid *William* ought to recover his damages, becauſe as well the ſaid *Richard*, as the ſaid *William*, between whom the contention

tention thereupon is, have put themſelves upon that jury, and have there then the names, &c."

If there are two ſheriffs, and one is intereſted in the cauſe, or related to either of the parties, the *venire* ſhould be awarded to the other only; or if both are intereſted, then to the coroner of the county.

A ſuggeſtion that one of the ſheriffs is intereſted.

And hereupon the ſaid united company ſay that *W. S.* and *R. W.* eſquires, are ſheriffs of London, and that the ſaid *W. S.* one of the ſaid ſheriffs, in his own right, is proprietor, and hath intereſt in, and to a ſhare or proportion of the principal ſtock of the ſaid united company to the value of
and is a member of the ſaid united company, and this the ſaid united company are ready to verify, and for this cauſe the ſaid united company pray a writ to be directed to the ſaid *R. W.* eſquire, the other ſheriff of London, to cauſe to come twelve, &c. to try the ſeveral iſſues between the ſaid parties, and becauſe the ſaid *Francis* doth not deny the aforeſaid allegation of the ſaid united company, but acknowledgeth the ſame, it is granted to them, &c. therefore let a jury, &c.

A ſuggeſtion that the ſheriff is of kin to the defendant.

And hereupon the ſaid *William White*, ſaith that *Richard Red*, eſquire, is ſheriff of the ſaid county of Eſſex, and that the ſaid *Benjamin Black* is of kin to the ſaid *Richard Red*, in this that one *John Black*, ſon of the ſaid *Benjamin Black*, married and took to wife, one *Mary Red*, who is yet alive, the daughter of the ſaid *Richard Red*, ſheriff of the county aforeſaid, and for this cauſe he prays a writ of our lord the king, of *venire facias*, to be directed to the coroner of the ſaid county of Eſſex, and becauſe the ſaid *Benjamin Black*, doth not deny the aforeſaid allegation of the ſaid *William White*, it is granted to him, &c. therefore it is commanded to the coroner of the ſaid county of Eſſex, that he cauſe to come here twelve, &c.

Common

Common diſtringas.

George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the ſheriff of Middleſex, greeting, we command you, that you diſtrain the bodies of the ſeveral perſons named in the panel hereunto annexed, jurors ſummoned in our court before us, between *William White* plaintiff, and *Benjamin Black* defendant, by all their lands and chattels in your bailiwick, ſo that neither they, nor any one of them, do intermiddle therewith, until you ſhall have other command from us in that behalf, and that you anſwer to us for the iſſues of the ſame, ſo that you have their bodies before us at Weſtminſter, on next after (the next return-day after the trial) or before our right truſty and well-beloved *William* earl Mansfield, our chief juſtice aſſigned to hold pleas, on our court before us, if he ſhall firſt come on (the day of trial) "at Weſtminſter-hall, in the county of Middleſex;" according to the form of the ſtatute in that caſe made and provided, to make a certain jury between the ſaid parties, of a plea of treſpaſs on the caſe, (or as the action is) and to hear their judgment of many defaults, and have there then the names of the jury, and this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the twelfth day of February, in the twenty-ſecond year of our reign.

Stormont and *Way.*

In London the *venire* and *diſtringas* run thus, "at the Guildhall of the city of London aforeſaid," at the aſſizes thus, "or before our juſtices aſſigned to take aſſizes in your county, if they ſhall firſt come on (the commiſſion day) at (the place where the aſſizes are held) according, &c.

Diſtringas *for a ſpecial jury.*

George, &c. to the ſheriffs of London, greeting: We command you, that you diſtrain *A. B.* &c. of,

&c. to the end of the maſters liſt, (merchants) the jury ſummoned in our court before us (as in a common one) and if there is a view after the word (default) is added, "And in the mean time, according to the form of the ſtatute in ſuch caſe made and provided, we command you, that you have ſix of the firſt twelve of the ſaid jurors, or as many more of them as you think fit, to take a view of the place in queſtion, on the day of and that the ſaid jurors meet on the ſame day, at the houſe of (as in the rule) in your city, and proceed from thence to view the ſaid place, in the preſence of *Richard Red* on the part of the plaintiff, and *George Green* on the part of the defendant, appointed by our court before us, to ſhew the ſaid place to ſuch of the ſaid jurors as ſhall come to view the ſame; and that you make appear to us at Weſtminſter, on the ſaid day, in what manner you ſhall have executed this our precept, and that you have then there this writ. Witneſs, &c."

If a view ſhall not be had by any of the jurors, whether they ſhall happen to be ſix, or any particular number of the jurors, who ſhall be mutually conſented to, yet the ſaid trial ſhall proceed, and no objection ſhall be made, on either ſide, on account thereof, or for want of a proper return to the ſaid writ. 4 *Burr.* 253.

If the action is by original, the *venire* and *diſtringas* are made returnable *ubicunq*, or, "whenever we ſhall then be in England," the defendant's addition is inſerted, and the word, then, omitted at the concluſion of the writ.

The *diſtringas* is amendable, the *diſtringas* in debt was *de placito* with a blank, and after verdict held amendable the *venire, facias* being right. *Lord. Raym.* 1143.

Chap. XX.

Of the Writ of Subpœna.

THE writ of ſubpœna to compel the appearance of witneſſes on the trial, is as follows:

George the third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. To (the witneſs by name, four of whom may be inſerted in a writ) greeting; We command you, that, all excuſes being laid aſide, you, and every one of you, be, in your proper perſons, before our right truſty and well beloved *William* earl Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us, at the Guildhall of the city of London, to teſtify all and ſingular, what you, or either of you, know in a certain cauſe now depending, undetermined in our court before us, between *William White*, plaintiff, and *Benjamin Black*, defendant, of a plea of treſpaſs on the caſe, (or as the action is), and at that day to be tried by a jury of the county; and this you, or any of you, are by no means to omit, under the penalty, upon each of you, of 100*l.* Witneſs, &c. *Stormont* and *Way*.

In Middleſex, "at Weſtminſter-hall, in the county of Middleſex;" at the aſſizes "before the juſtices aſſigned to hold the aſſizes in and for the county of on at in the ſaid county.

Præcipe.

Middleſex, ſubpœna, to teſtify between *A. B.* plaintiff, and *C. D.* defendant, on the part of the plaintiff; ſigning 1*s.* 8*d.* ſealing 7*d.* and a ſubpœna ticket is then made out for each witneſs, to the following purport:

To Mr.

By virtue of a writ of ſubpœna to you directed, and here with ſhewn unto you, you are commanded perſonally to be and appear before "*William* earl Mansfield, lord chief juſtice of his majeſty's court of

king's bench, on Monday the 5th day of July, inſtant, by eight of the clock, in the forenoon of the ſame day, at Weſtminſter-hall, in the county of Middleſex," to teſtify the truth according to your knowledge, in a certain cauſe now depending, and there to be tried between *William White*, plaintiff, and *Benjamin Black*, defendant, and hereof you are not to fail, on pain of one hundred pounds. Dated the day of in the year of the reign of our ſovereign lord George the Third, king of Great Britain, &c. in the year of our lord

By the court,

A. B. Attorney for the plaintiff.

Each witneſs is to be paid 1*s.* on ſervice.

If in the country, the party muſt have his reaſonable expences tendered him. 2 *Stra.* 1150. nor will the court grant an attachment without perſonal ſervice. *Str.* 1084. and witneſſes are to have reaſonable notice. *Str.* 510.

If a witneſs ſhould be detained in priſon, the following *habeas corpus* may be had, to bring him into court as an evidence, on leaving which, the gaoler muſt bring him up.

George the third, &c. To the marſhal of our priſon of the Marſhalſea, greeting: (or to the perſon in whoſe cuſtody he is) We command you, that the body of *Richard Red*, in our priſon, under your cuſtody as it is ſaid, detained under ſafe and ſecure conduct, by whatſoever name the ſaid *Richard* may be called in the ſame, you have before our right truſty and well beloved *William* earl Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us, at Weſtminſter-hall, in the county of Middleſex, (or according to the place of trial as before) by nine of the clock in the forenoon of the ſame day, there to teſtify the truth, according to his knowledge, in a certain cauſe now depending in our court before us, and then and there to be tried between *William White*, plaintiff, and *Benjamin Black*, defendant, in a plea of treſpaſs and aſſault (or as the action is) and immediately after the ſaid *Richard Red* ſhall then and there

there have given his teſtimony before the ſaid chief juſtice (if in town; if in the country, "before our ſaid juſtices,") toreturn him, the ſaid *Richard Red*, to our ſaid priſon, under ſafe and ſecure conduct, and have you there then this writ. Witneſs *William* earl Mansfield, at Weſtminſter, &c.

Stormont and *Way*.

A *præcipe*, is made for this writ; ſigning 6*s*. 8*d*. in term; 7*s*. 8*d*. vacation; ſeal 7*d*. but a judge's *fiat* muſt firſt be had upon an affidavit made by the party who applies, that the perſon is a material witneſs on his part; and the *habeas corpus* when ſigned muſt be left with the marſhal or gaoler, in whoſe cuſtody the witneſs is. 4 *Burr*. 1440.

Of a ſubpœna duces tecum.

If any perſon has in his poſſeſſion any writings or other things that it may be neceſſary to produce on the trial or the execution of the enquiry, he ſhould be ſerved with a *ſubpœna duces tecum*, commanding him to bring with him, and produce the ſame at the trial, of the cauſe or execution of the enquiry, which ſubpœna is the ſame as the former, only a clauſe is inſerted after mentioning the place of trial or enquiry, to the following effect:

"And that you alſo produce, and bring with you at the time and place aforeſaid, a certain deed or inſtrument in writing, bearing date, &c. (deſcribing the thing to be produced) then and there to teſtify and ſhew all and ſingular thoſe things which you or either of you know, or the ſaid deed or inſtrument doth impart, of and concerning a certain action, now in our court before us depending, &c."

Motion for an attachment againſt a witneſs ſerved with a *ſubpœna duces tecum*, that did not bring a will with him to trial, which he had notice to produce *per cur*. as there was no ſeal upon the regiſter to produce the will at the trial, no rule can be made on the motion. *Barnes* 28.

The

The affidavit must be made by the party applying for the rule, *Fort.* 396. And the party must not only swear that such person is a material witness, but also that he is ready to come to testify, *per cur.* Hil. 1780.

A general rule was made by the court that no *habeas corpus ad testificandum* of either side civil or crown should be granted without an affidavit that the prisoner to be brought up is a material witness.

The plaintiff moved for a *habeas corpus* to bring two prisoners in the Fleet, both charged in execution to Guildhall, to testify in a cause upon an affidavit of their being material witnesses, and a rule was made to shew cause why it should not be granted, or why they should not be examined upon interrogatories, and their depositions read, the plaintiff indemnifying the warden, but for want of the consent of the defendant, and the warden, the rule was discharged. *Barnes* 222.

The point of law is, whether under such *habeas corpus* the prisoners being in execution, the warden could defend himself against an escape; the last time this question was before all the judges, seven against five were of opinion that the *habeas corpus* would not excuse the warden, but that he would be liable to answer for an escape. *Barnes* 222.

The party at whose instance, a prisoner is brought up by virtue of an *habeas corpus ad testificandum*, in order to his being examined in his behalf at the trial, must take care that there be a good and sufficient guard with the witness, for the damages of the escape of the prisoner will be at the risque of the party who brings him up, the charge of which, and also of his being carried back again, must be born by such party. *Style. Rep.* 128, 130. *Treton* v. *Square*, *Ibid.* 119, 126.

Witnesses ought to have a reasonable time to put their affairs in such order that their attendance upon the court may be as little prejudice to themselves as possible, and the court held that notice, at two in the afternoon in the city, to attend the sittings that evening at Westminster, was too short a time. *Stra.* 510.

On

On motion for an attachment againſt a witneſs, for diſobeying a ſubpœna ſerved at Cheſter to attend the ſittings at Guildhall; the court held that a tender of two guineas for his expences was too little; ſaying that a witneſs is not obliged to truſt to the court allowing him more when he comes to the book, for the party may not call him, and then he may find it difficult to get home again 2. *Stra.* 1150.

The court will not grant an attachment againſt a witneſs without he has been perſonally ſerved, without perſonal ſervice it is not ſufficient to warrant a proceeding criminally, whatever it might do in an action.

Chap. XXI.

Of examining witneſſes on interrogatories before a judge.

IF after the iſſue is delivered, and notice of trial given, a witneſs, that is material on either ſide, is going abroad, or beyond ſea, ſo that he cannot be had at trial, the party may apply to the court for a rule, that ſuch witneſs may be examined before one of the juſtices of this court; this rule is a rule to ſhew cauſe, and the motion muſt be upon affidavit of the perſon being a material witneſs on the part for which he is to be examined, without whoſe teſtimony the party cannot proceed to the trial, and that he is going to Scotland, Ireland, or out of the kingdom; counſel's fee is ten ſhillings and ſix-pence, for the rule to ſhew cauſe, and one guinea to make it abſolute; rule five ſhillings, this rule is to be ſerved on the oppoſite attorney and on affidavit of the ſervice, the rule will be made abſolute, if no good cauſe ſhewn. Notice muſt be given, of the time the witneſs is examined, ſo that the other party may be at liberty to file interrogatories, and croſs-examine him on his part.

In vacation, the application muſt be made in a ſummary way; by getting a ſummons from a judge, to ſhew cauſe why *A. B.* a material witneſs, may not be

be examined, on the part of the plaintiff, on interrogatories, and upon producing the like affidavit as before, no cauſe being ſhewn to the contrary, the order will be granted.

The witneſs is to be taken to the judge's clerk, who examines him; and the interrogatories are to be left there, and he is to be ſworn upon them, after he is examined on both ſides, the judge's clerk will deliver out copies of the depoſitions. The interrogatories are to be ſigned by counſel, fee, one guinea; and ingroſſed on a double 12 *d.* ſtampt parchment.

The interrogatories.

" Interrogatories to be adminiſtred to *Richard Red*, a witneſs to be produced ſworn, and examined on the part and behalf of *William White*, plaintiff, againſt *Benjamin Black*, defendant, before one of the juſtices of the court of our lord the king, before the king himſelf, purſuant to a rule of the ſaid court, made on Wedneſday next, after fifteen days of Saint Martin, in the twenty-ſecond year of his majeſty king George the third, day of 1783."

Do you know the parties, plaintiff and defendant, in the title of theſe interrogatories named, or either, and which of them, and how long have you known them, either, and which of them; declare the truth, and your knowledge herein.

Look upon the deed or writing now produced and ſhewn to you, at this the time of your examination, marked with the letter *A.* and purporting to be, &c. was ſuch deed or writing ſealed and delivered in your preſence, and by whom? were you a ſubſcribing witneſs to the ſealing and delivering thereof? and is your name indorſed and ſet as a witneſs thereto of your own hand-writing? and do you know the hand-writing of the other witneſs, or witneſſes, thereto? and is or are the name or names of ſuch witneſs, or witneſſes? of the proper hand writing of ſuch witneſs or witneſſes; and did you ſee them ſet any, and which of their names as ſubſcribing witneſs or witneſſes thereto? ſet forth the particulars at

at large, according to the beſt of your knowledge, remembrance, information and belief.

Laſtly, Do you know of any other matter or thing, or can you ſay any thing touching the matter in queſtion in this cauſe, that may tend to the benefit and advantage of the complainant, beſides what you have been interrogated unto, declare the ſame fully and at large as if you had been particularly interrogated thereto.

Interrogatories for the defendant.

Interrogatories to be adminiſtred to *Richard Red*, a witneſs to be produced, ſworn and examined, on the part and behalf of *Benjamin Black*, the defendant, before one of the juſtices of the court of our lord the king, before the king himſelf, purſuant, &c.

The interrogatories are to be varied according to the circumſtances of the caſe, and great care is required in drawing them, that the queſtions be not too leading.

If a witneſs is at a diſtance, a rule muſt be obtained to examine him before commiſſioners ſpecially appointed, and approved of by the oppoſite party, upon which a writ of *dedimus poteſtatem* iſſues, which is annexed to the interrogatories, and the commiſſioners certify the anſwers under their ſeal.

When a witneſs will be abſent eighteen months, the court will not grant a rule *niſi*, to put off trial, without the defendant will engage to make a ſpecial caſe, ſtating the nature of the demand, and what the witneſs could prove. *Lord* v. *Cooke*, 1 *Blackſt. Rep.* 436.

If a witneſs going to ſea be examined upon interrogatories before a judge, and the trial comes on before he is gone, his depoſition ſhall not be read, but he muſt appear; for the rule in ſuch caſe is made on a ſuppoſal of his abſence. *Salk.* 196.

Chap. XXII.

Of Verdicts, and of the Poſtea.

IF the iſſue be an iſſue of fact, and upon the trial it be found for either the plaintiff or the defendant; or ſpecially; or if the plaintiff makes default, or is nonſuit; or whatever is done, ſubſequent to the joining iſſue and awarding the trial, it is entered upon record, and called a *poſtea*; the purport of which is, that *poſtea*, afterwards, the plaintiff and defendant, appeared by their attornies at the place of trial, and a jury being ſworn, found ſuch a verdict; or, that the plaintiff, after jury ſworn, made default, or as the caſe is; this is added to the roll, which is then returned to the court from which is was ſent, and the hiſtory of the cauſe from the time it was carried out is thus continued by the *poſtea*.

Verdicts are

General, when the whole matter in iſſue is found generally.

De bene eſſe, where the matter in iſſue is found *conditionally* ſubject to the opinion of the court.

Privy, that is, where the verdict is given privily or ſecretly to the judge till a verdict is given openly by the jury in court. This kind of verdict is permitted for the eaſe of the jury, that they may refreſh themſelves; and they may differ from this *privy* verdict when they come into court, ſo that the privy verdict is in fact a mere nullity, and yet it is a dangerous practice, as giving an opportunity for the parties to tamper with the jury; and therefore now, ſeldom, if ever indulged; but if the judge hath adjourned the court to his own lodgings, and there receive the verdict, this is a public, and not a privy verdict.

Special, where the matter ſubmitted to the jury is found ſpecially, and they ſubmit the queſtions of law, ariſing from thoſe facts, to the conſideration of the court.

Special

Special verdicts are founded upon the ſtatute 13 *Ed.* 1. *c.* 30. *ſ.* 2. and ſtate the naked facts as proved, praying the advice of the court, and concluding, that if upon the whole the court ſhall be of opinion for the plaintiff, they find for the plaintiff, otherwiſe for the defendant; this is entered, at length, upon the record, and afterwards argued and determined in the court at Weſtminſter. When the jury find a verdict generally for the plaintiff, but ſubject to the opinion of the judge or court, on a ſpecial caſe as to matter of law; the deciſion is much more ſpeedy and leſs expenſive, as the *poſtea* is ſtayed in the hands of the officer of *niſi prius* till the queſtion is determined, and then entered for the plaintiff or defendant, as the caſe may be; but in this caſe, as nothing but the general verdict appears upon the record, the parties are precluded from the benefit of a writ of error if diſſatisfied with the opinion of the judge or court.

The jury, on a verdict for the plaintiff, aſſeſs the damages he has ſuſtained, which aſſeſſment is taken down by the judges aſſociate on the back of the record.

If there are ſeveral iſſues, and the jury find for the plaintiff generally, it is neceſſary to purſue the iſſues in the *poſtea*; becauſe the jury, by finding generally, confirm the truth of all the iſſues.

When the cauſe is tried at the ſittings in London or Middleſex, the aſſociate of the chief juſtice delivers the party for whom the verdict has been given, the record, and he afterwards indorſes the *poſtea* from the aſſociate's minute; but if the cauſe is tried at the aſſizes, the aſſociate keeps the record till the next term; and he indorſes the *poſtea*, in the mean while, for which his fee is received at the trial.

The court fees which are paid by the victor, except about ten ſhillings and ſix-pence paid by the other ſide, are uſually in London and Middleſex.

	£.		
On a verdict for the plaintiff	2	18	8
On a nonſuit	2	1	0
When a cauſe is referred	2	7	10

When the cauſe is tried at the aſſizes the expence ſomewhat differs.

A rule for judgment, where the cauſe is tried within term, may be given at any time within four days after the end of the term; but ſuch rule cannot be given before the day in bank.

If the plaintiff becomes nonſuit, no rule is neceſſary, but coſts may be taxed immediately after the day in bank.

The marking of the *poſtea* or putting the word *deliberatur* or "delivered of record" may be done any time before the coſts are taxed, for which is paid fourpence. Upon the return of the *diſtringas*, a rule for judgment is to be given on the *poſtea* with the clerk of the rules, for which is paid one ſhilling and tenpence. *And.* 196.

Rule for Judgment.

William White
againſt
Benjamin Black.

Rule for judgment on the *poſtea*.

The *poſtea* is engroſſed on the back of the record on a double half-crown ſtamp, and marked by the clerk of the common bails, "delivered of record."

Poſteas for the plaintiff.

On *non aſſumpſit*.

Afterwards (that is to ſay) on the day and at the place within mentioned, before the right honourable William earl *Mansfield*, the chief juſtice within written, *John Way* gentleman, being aſſociated unto the ſaid chief juſtice, by force of the ſtatute in that caſe made and provided, the within named *William*, came by his attorney within contained, and the within named *Benjamin*, although ſolemnly required, came not, but made default, therefore let the jurors of that jury within mentioned be taken againſt him by his default, and the jurors of that jury being ſummoned, came, who to ſay the truth of the within contents,

contents, being choſen, tried and ſworn, ſay, upon their oath, that the within named *Benjamin* did undertake and promiſe, in manner and form as the within named *William* hath within complained againſt him; and they aſſeſs the damages of the ſaid *William*, by occaſion of the not performing the within mentioned promiſes and undertakings, over and above his coſts and charges, by him about his ſuit, in this behalf expended, to fifty pounds, and for thoſe coſts and charges to forty ſhillings. Therefore, &c.

Afterwards (that is to ſay) on the day and at the place within mentioned, before the right honourable *William* earl Mansfield, the chief juſtice within written, *John Way*, gentleman, being aſſociated unto him, according to the form of the ſtatute in that caſe made and provided, came the within named *William*, by his attorney within contained, and the within named *Benjamin*, although ſolemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of againſt him by his default; and the jurors of that jury being ſummoned, ſome of them, that is to ſay, (here are named only the jurors that appeared on the panel) and becauſe the reſidue of the jurors of the ſame jury do not appear, therefore other perſons of thoſe ſtanding by the court, by the ſheriff of the county aforeſaid, at the requeſt of the ſaid *William*, and by the command of the ſaid chief juſtice, (if in London or Middleſex, if at the aſſizes, then by the command of the ſaid juſtices) are now newly ſet down, whoſe names are affiled in the within written panel, according to the form of the ſtatute in that caſe made and provided, which ſaid jurors ſo newly ſet down that is to ſay, *Richard Red* of, &c. grocer (naming the reſt of the taleſmen) being required, came, who, together with the ſaid other jurors before impanelled, and ſworn to declare the truth of the within contents, being elected, tried and ſworn, upon their oath declare, that the ſaid *Benjamin* did undertake and promiſe in ſuch manner and form as the ſaid *William* hath

With a *tales de circumſtantibus.*

hath within complained againſt him; and they aſ-
ſeſs the damages of the ſaid *William*, by reaſon of
the not performing the promiſes and undertakings
within written, beſides his expences and coſts laid
out by him in this behalf, to fifty pounds, and for
thoſe coſts and charges to forty ſhillings. There-
fore, &c.

On *non eſt factum.* That the within mentioned writing obligatory, is
the deed of the within named *Benjamin*, as the
within written *William* hath within declared againſt
him, and they aſſeſs the damages of the within named
William, by occaſion of the detaining the within
debt, over and above his coſts and charges by him
about his ſuit in this behalf laid out to one ſhil-
ling, and for his coſts and charges to forty ſhillings.
Therefore, &c.

On *nil debet.* That the within named *Benjamin* doth owe to the
within named *William* the ſaid fifty pounds within
mentioned, in manner and form as the ſaid *William*
within complains againſt him, and they aſſeſs the
damages of the within named *William*, by occaſion
of detaining the within debt, over and above his
coſts and charges about his ſuit in this behalf laid
out to one ſhilling, and for his coſts and charges
to forty-ſhillings. Therefore, &c.

In *treſpaſs.* That the within named *Benjamin* is guilty of the
premiſes within laid to his charge in manner and
form as the ſaid *William* within complains againſt
him, and they aſſeſs the damages of the ſaid *William*,
by occaſion thereof, over and above his coſts and
charges, by him in this behalf expended to fifty
pounds, and for thoſe coſts and charges to forty
ſhillings. Therefore, &c.

In *plene adminiſtravit.* That the ſaid *Benjamin* (the defendant) hath, and
on the day of exhibiting the bill of the ſaid
William, within written, had divers goods and
chattels, which were of the ſaid *John* within
mentioned at the time of his death in his hands
to be adminiſtred, to the value of the debt within
ſpecified, whereof he might have made ſatisfaction
to the ſaid *William* for his ſaid debt, as the within
named *William* in his ſaid replication hath al-
ledged, and they aſſeſs the damages of the ſaid

William

William by occaſion thereof, beſides his expences and coſts by him about his ſuit in this behalf expended, to fifty pounds, and for his coſt and charges to forty ſhillings. Therefore, &c.

That the ſaid *Benjamin* is guilty of the treſpaſs and ejectment within written in manner and form as the ſaid *William* hath within complained againſt him; and they aſſeſs the damages of the ſaid *William*, by occaſion thereof, over and above his expences and coſts, laid out by him about his ſuit in this behalf, to one ſhilling, and for his expences and coſts to forty ſhillings. Therefore, &c. In ejectment.

That the ſaid *Benjamin* did within ſix years next before the day of exhibiting the bill of the ſaid *William*, undertake and promiſe in manner and form as the ſaid *William* hath within by his replication alledged, and they aſſeſs the damages of the ſaid *William* by occaſion of the not performing the ſaid promiſſes and undertaking, over and above his coſts and expences laid out by him about his ſuit in this behalf to fifty pounds, and for his expences and coſts to forty ſhillings. Therefore, &c. On *non aſſumpſit infra ſex annos.*

That the within written *John* in his life-time, and before the day of exhibiting the within written bill, did not pay or cauſe to be paid to the within named *William*, the within mentioned ſum of fifty pounds, and all intereſt due for the ſame, as the ſaid *Benjamin* hath within in pleading alledged, and they aſſeſs the damages of the ſaid *William* by reaſon thereof, beſide his expences and coſts laid out by him about his ſuit in this behalf to twelve pence, and for his expences and coſts to forty ſhillings. Therefore, &c. On *ſolvit ad diem.*

Being elected, impanneled, and ſworn to declare the truth of the within contents, as to the firſt iſſue joined, between the ſaid *William* and the ſaid *Benjamin* declare upon their oath, that the ſaid *Benjamin* is guilty of the premiſes within charged upon him, as the ſaid *William* hath within alledged: and as to the other iſſue joined between the ſaid *William* and the ſaid *Benjamin*, the ſaid jurors upon their ſaid oath further ſay, that the ſaid *Benjamin* of his own wrong, In *aſſault* on two pleas.

and

and without any ſuch cauſe as the ſaid *Benjamin* within in pleading hath alledged, made an aſſault upon the ſaid *William*, and then and there did beat, bruiſe, wound, and ill-treat the ſaid *William* in manner and form as the ſaid *William* hath within in his ſaid replication in that behalf alledged, and they aſſeſs the damages of the ſaid *William* by reaſon thereof, beſides his coſts and charges by him laid out, about his ſuit in this behalf, to fifty-pounds, and for thoſe coſts and charges to forty-ſhillings. Therefore, &c.

Poſteas for the defendant.

On not guilty in treſpaſs.

That the ſaid *Benjamin* is not guilty of the treſpaſs in the declaration within ſpecified as the ſaid *William* within complained againſt him. Therefore, &c.

On *plene adminiſtravit.*

That the within named *Benjamin* at the time of exhibiting the bill of the ſaid *William* within mentioned, did fully adminiſter all and ſingular the goods and chattels which were of the ſaid *John* at the time of his death, in his hands to be adminiſtred; and that the ſaid *Benjamin*, had not, nor on the day of exhibiting the within bill, or at any time afterwards, had any goods or chattels which were of the ſaid *John* at the time of his death, in his hands to be adminiſtered, wherewith he was able to pay the debt within ſpecified, or any part thereof, to the ſaid *William*, as he the ſaid *Benjamin* hath within in pleading alledged, Therefore, &c.

On *non aſſumpſit* by an executor.

That the within written *John* the teſtator did not in his life-time undertake and promiſe in manner and form as the ſaid *William* hath within declared againſt him. Therefore, &c.

On nonſuit

And the jurors of that jury, being ſummoned, came; who, to ſay the truth of the within contents were choſen, tried, and ſworn; and after evidence being given to them of and upon the within contents, went from the bar of this court, to diſcourſe of their verdict of and upon the premiſes; and after the ſaid jury had diſcourſed and agreed among themſelves, they came back to the ſaid bar to give their verdict in this behalf; upon which the ſaid *William* (the plaintiff) being ſolemnly required, came not; nor did

did he further proſecute his ſaid bill againſt the ſaid *Benjamin*. therefore, &c.

No judgment, either for plaintiff or defendant, can be ſigned upon a writ of *niſi prius*, or enquiry executed, until the end of four days, excluſive of the day on which the rule for judgment is given; during which time the oppoſite party may move in arreſt of judgment or for a new trial.

When the rule for judgment is out, the *niſi prius* record muſt be ſtamped, and when the maſter has taxed the coſts, judgment may be entered of record and execution ſued out.

On a ſpecial verdict the attorney for the plaintiff ſtates the verdict on the record, and delivers it to the clerk of the papers, and then moves for a *conſilium*, or a time to be appointed for arguing the verdict, the rule for which muſt be ſerved on the defendant's attorney; and the judges have books delivered to them as on the argument of demurrers.

In covenant the verdict was for two hundred and ſeventy-four pounds, eleven ſhillings, and it was ſo entered by the judge in his minutes; but the clerk at *niſi prius*, only marked it one ſhilling on the back of the *diſtringas*. The court on motion ordered the indorſement to be altered agreeable to the judge's notes. *Newcomb* v. *Green*, *Stra.* 1197.

After verdict for the plaintiff, the record of *niſi prius* and writs of *hab. corp. juratorum* were loſt by the aſſociate. Rule for the defendant and the aſſociate to ſhew cauſe why new records and writs ſhould not be made out agreeable to thoſe loſt, and verdicts returned according to the finding of the jury. No cauſe being ſhewn, rule made abſolute. *Barnes*, 466.

Rule to ſhew cauſe why the *poſtea* ſhould not be amended by returning the verdict, on the third inſtead of the firſt count, according to the finding of the jury; made abſolute, on the report of the judge before whom the cauſe was tried: ordered that the aſſociate do amend the *poſtea*, in court; that the defendant have four days after to move in arreſt of judgment, and that the plaintiff pay the defendant's coſts of the application. *Ibid.* 449.

On the trial of the validity of a bankruptcy, the jury found a ſpecial verdict, "That the bankrupt bought and ſold divers quantities of potatoes," this the court held too general. The plaintiff moved, on affidavit, that the quantities were proved at the trial, that a *venire facias de novo* might be awarded. But the court allowed the ſpecial verdict to be amended in that reſpect.

Action for words. If the words be in one count, and ſome are not actionable, the court will intend that ſuch, were only ſet forth to ſhew the malice of the party, and that the damages were given for what were actionable. *Oſborne's caſe*, 10 *Co.*

Verdict taken by miſtake of the aſſociate againſt two defendants, inſtead of not guilty, as to one, and guilty, with two hundred pounds damages as to the other. The return of the *poſtea*, as to the one not guilty, ordered to be amended on the motion of the plaintiff, and the chief juſtice's report. The return of the *poſtea* is the act of the judge, and muſt be made as it ought to be. *Barnes* 6.

Treſpaſs vi et armis againſt two, for aſſault and battery, both pleaded together, not guilty; verdict on the iſſue for plaintiff, but the jury aſſeſſed different damages, error was brought and the judgment reverſed, for the treſpaſs being jointly charged, and the verdict having found them jointly guilty, the jury could not aſſeſs ſeveral damages. *Burr. Rep.* 4 *pt.* 2790

In *aſſumpſit*, and iſſue joined on a fact in a plea of abatement, the jury gave a verdict for the plaintiff, but did not aſſeſs any damages; the plaintiff moved for a writ of enquiry; but *per cur.* A writ of enquiry cannot be awarded to ſupply the omiſſion of the jury in not finding damages; but a *venire facias de novo* muſt go; for where a man may have an attaint, no damages ſhall be aſſeſſed by the court, if they be not found by the jury. Damages are the whole object of the writ and ſuit; and though iſſue be joined on a fact in abatement, yet as to the defendant it is intirely concluſive, and involves the damages upon the finding of the fact; and if outrageous damages had been given, an attaint would have

have laid. In treſpaſs the defendant pleaded an arbitrement, and it was found againſt him: and the court held, that in treſpaſs the whole recovery is damages, which cannot be aſſeſſed but by the jury who tried the principal iſſue, 11 *Hen.* 4. a *venire facias de novo* muſt therefore be awarded. *Eichorn* v. *Le Maitre*, 2 *Wilſ.* 367.

In debt on bond for performance of covenants, or debt for a penalty on articles of agreement, the jury ought to aſſeſs ſome damages on the breach aſſigned by the plaintiff, according to the ſtat. 8 & 9 *W.* 3. *c.* 11. and ought not to find the debt generally, as in caſe of a ſingle bond, or a bond with condition for payment of money only; for if they find the debt or penalty generally, and omit to aſſeſs the damages on the breach or breaches aſſigned, it is by that ſtatute a defective verdict, and a *venire facias de novo* ſhall be awarded. *Drage* v. *Brand*, 2 *Wilſ.* 367.

A verdict general, or ſpecial, may be amended by the notes, in the book of the clerk of the aſſize, if there be a miſpriſion. *Salk.* 53. But not in a criminal caſe.

Upon a demurrer to evidence, although the matter of fact be confeſſed, yet the jury may aſſeſs the damages condition ally, *viz.* that if upon argument of the demurrer the law ſhould be for the plaintiff, then ſo much, &c. *Plowd.* 408. *Stile* 22.

The damages may alſo be aſſeſſed by a *writ* of *enquiry*, when the demurrer ſhall be determined.

A demurrer to evidence admits the fact, but denies its effect in law; and if at the aſſizes, ſhall be tried and determined in the court from where the record iſſued. If on written evidence the plaintiff muſt join or waive it, otherwiſe on *parol* evidence. 3 *Salk.* 122.

If the plaintiff hath a verdict on one count, coſts are taxed only on that count. *Bridges* v. *Raymond*, 2. *Blackſt. Rep.* 800.

If the judges of aſſize die after verdict, and before the day in bank, the clerk of aſſize returns the *poſtea*, making a ſpecial entry. *Salk.* 691.

Where the iſſue is immaterial it is not helped by a verdict; otherwiſe when it is only informal, by ſtatute. 32 *Hen.* 8.

A cauſe commenced as a town cauſe, and not objected to, ſhall be conſidered as ſuch in all ſubſequent ſtages, eſpecially after a verdict. 2 *Blackſt. Rep.* 992.

Chap. XXII.

Of Arreſt of Judgment.

ARREST of judgment muſt ariſe from ſome matter on the face of the record, and it is a rule with regard to arreſt of judgment on matter of law, "that whatever is alledged in arreſt of judgment muſt be ſuch matter, as would, upon demurrer, have been ſufficient to overturn the action, or plea," as if upon an action of ſlander the defendant denies the words, and iſſue is joined thereon, and a verdict found for the plaintiff that the words were actually ſpoken, yet the defendant may move in arreſt of judgment that the words found to have been ſpoken were not actionable, and if the court be of that opinion judgment will be arreſted and not entered for the plaintiff; but the reverſe of the rule will not hold, nor is everycauſe of demurrer ſufficient to arreſt judgment; for a verdict aſcertains thoſe facts which before, from the inaccuracy of the pleadings, might appear dubious. Exceptions therefore in arreſt of judgment muſt be much more material than thoſe which would ſupport a demurrer. But if the thing omitted be eſſential to the action or title, as if the plaintiff doth not merely ſtate his title in a defective manner, but ſets forth a title that is totally defective in itſelf, *Salk.* 305. or if to an action of debt the defendant pleads not guilty inſtead of *nil debet*, Cro. Eliz. 778. theſe cannot be cured by a verdict for the plaintiff in the firſt caſe, or for the defendant in the ſecond.

To arreſt the judgment after verdict, or inquiſition of damages, a motion muſt be made for a rule for the

poſtea

poſtea or inquiſition to be brought into court; the rule is to be drawn up by the clerk of the rules, paying 5*s*. The motion muſt be made within four days next after the rule for judgment given, ſo that it may be in fact on the fifth day. It is a rule to ſhew cauſe, therefore needs no notice to be given, nor yet an affidavit to ground it, as it ariſes out of the record.

After judgment upon demurrer there can be no motion made in arreſt of judgment, as the court will not ſuffer any one to tell them that the judgment they gave, on mature deliberation, is wrong; but otherwiſe in judgment by default as not given in ſo ſolemn a manner, or if the fault ariſes in the writ of enquiry or verdict, for then the party cannot alledge it before. *Stra.* 425.

In debt on bond the defendant pleaded *ſolvit ad diem*, and concluded, "and this he prays may enquired of by the country;" and the plaintiff ſubjoined, "and the aforeſaid defendant doth the like." On motion in arreſt of judgment the objection was over-ruled. *Rawbone* v. *Hickman*, 9 *Geo.* 1.

Judgment ſhall not be lightly arreſted after verdict, *Burr.* 4 *pt.* 3 *vol.* 1725. 1729. The plaintiff on an iſſue tendered by the defendant joined the iſſue thus, "and the aforeſaid defendant doth the like;" inſtead of ſaying, "and the aforeſaid plaintiff doth the like; by motion in arreſt of judgment the objection was over-ruled. *Harvey* v. *Piake*, *Burr. Rep.* 4 *pt.* 1793.

In an action on a joint bond againſt one obligor, if it appears on the face of the declaration, judgment may be arreſted, otherwiſe muſt be averred. *Burr. Rep.* 4 *pt.* 3614.

Action of debt on bond in Middleſex, the condition of which was to pay money in London; after verdict, motion in arreſt of judgment, that the action ought to have been tried in London. *per, cur.* (abſente Holt) it is aided after verdict. *Maitland* v. *Taylor*, *Lord Raym.* 1212.

In treſpaſs for taking divers goods, not ſaying what goods, after verdict and damages for plaintiff, judgment was arreſted. *Lord Raym.* 1410. *Stra.* 937.

Chap. XXIV.

Of new Trials.

IT was formerly held for law, that whatever matter was of force, to avoid a verdict, ought to be returned on the *poſtea*, and not merely ſurmiſed to the court, leſt poſterity ſhould wonder why a new *venire* was awarded without any ſufficient reaſon appearing upon the record. *Cro. Eliz.* 616. *Palm.* 325. 1 *Brownl.* 207.

But very early, in the reign of Charles the ſecond, new trials were granted upon affidavits, 1 *Sid.* 233. 2 *Lev.* 149. and the former ſtrictneſs of the courts of law, in reſpect of new trials, having driven many into the courts of equity, they are now more liberally granted; the maxim being, that where juſtice is not done on one trial, the injured party is intitled to another. 4 *Burr.* 395.

On a new trial the cauſe is reheard before another jury; no advantage is taken of the former verdict on the one ſide, or the rule awarding ſuch ſecond trial on the other: nor doth a contradictory verdict, in general, import any blame to the former jury, who might, on new lights, have altered their former opinion.

If the ground for a new trial could not, or did not appear to the judge of *niſi prius*, it muſt be ſtated by affidavit; if it ariſes from what paſſed at the trial, it is taken from the report of the judge; and the queſtion, Whether ſuch new trial ſhall be granted? is argued by counſel on both ſides and then determined by the court.

A new trial will not, however, be granted in matters of inconſiderable value or on nice and formal objections, nor in caſes where the rigorous exaction of extreme legal juſtice is ſcarce reconcilable to conſcience; nor where the ſcales of evidence hang nearly equal; for that which leans againſt the former verdict ought very ſtrongly to preponderate.

If

If the party againſt whom the verdict is obtained wiſhes for a new trial, the motion for the ſame muſt be moved for within the four days incluſive; and the motion is generally made on an affidavit, (unleſs the cauſe ariſe from a verdict given contrary to evidence, a miſ-direction of the judge at *niſi prius*, or where the jury have given exceſſive damages,) of ſome new matter being diſcovered ſince the trial.

If a new trial be denied, a motion in arreſt of judgment may be made on a ſimilar affidavit; but if a motion in arreſt of judgment be firſt made and refuſed, a new trial cannot be afterwards moved for; nor can a motion for a new writ of inquiry be made after a motion in arreſt of judgment. *Salk.* 647.

The court will not grant a new trial in penal actions. 3 *Wilſ.* 59.

A new trial may be granted a ſecond time, if the reaſons for granting it are ſufficient. 4 *Burr.* 2108.

A new trial may be granted in ejectment, and after a trial at bar. 4 *Burr.* 2224. *Str.* 1105.

In an action for a libel, a new trial was refuſed, though found for the defendant againſt the evidence, becauſe it was no matter of contract, no ſpecial damages laid or proved, but only a vindictive action; and courts of juſtice will not aſſiſt the paſſions of mankind. *Burton* v. *Thompſon*, 2 *Burr.* 665.

A new trial may be granted after a nonſuit, if improperly directed by the judge, 3 *Wilſ.* 146, 338. 4 *Burr.* 1986. or upon proper and ſufficient grounds.

A new trial is ſeldom granted but upon payment of coſts, unleſs the judge, ſpecially at *niſi prius*, orders it to be moved for; but it is diſcretionary in the court. 3 *Burr.* 1846.

A juror on the principal panel was challenged and afterwards ſworn on the *tales* by a wrong name; and although no fault was found with the verdict, yet a new trial was granted. *Parker* v. *Thornton*, *Strange* 629. *Lord Raymond* 1410.

The

The courts will grant a new trial where there has been exceſſive damages; but never where the damages have been thought too ſmall. 2 *Str.* 1051.

If a new trial for exceſſive damages, and the ſame damages again given, the court will not grant a third trial. *Stra.* 692.

Action againſt two, one acquitted, the other found guilty, that defendant cannot have a new trial. *Stra.* 814.

The court will not grant a new trial upon the application of a party for want of evidence which he might have produced at the trial. *Cooke* v. *Barry*, 1 *Wilſ.* 98.

If the plaintiff refuſes to be nonſuited, contrary to the opinion of the judge, a new trial, if granted, ſhall be without coſts. Or if the plaintiff ſubmits to a nonſuit by the erroneous opinion of the judge, the nonſuit ſhall be ſet aſide without coſts. 1 *Blackſt. Rep.* 670.

A new trial is ſeldom granted in ejectment on a verdict for the defendant, becauſe the plaintiff may bring a new ejectment; otherwiſe if verdict for the plaintiff, becauſe the effect of ſuch verdict is an alteration of the poſſeſſion.

An action was brought againſt one partner on a partnerſhip account, which appearing in evidence on the trial, the plaintiff was nonſuited; but the court ſet aſide the nonſuit, ſaying, It cannot be given in evidence, but ſhould have been pleaded in abatement. *Rice* v. *Shute*, *Burr. Rep.* 4 *pt.* 2612.

The plaintiff, a baronet and member of parliament, had 10,000 *l.* damages in an action on the caſe for a malicious proſecution. A new trial on account of exceſſive damages refuſed. *Sir Alexander Leith* v. *Pope*, *Mich.* 20 *Geo.* 3. *C. B.* 2 *Blackſt. Rep.* 1327.

A new trial was granted, becauſe the foreman of the jury had declared the plaintiff ſhould never have a verdict. *Salk.* 645.

Verdict for the plaintiff. On motion for a new trial the court was divided in opinion, therefore no rule being

ing made, plaintiff at liberty to ſign judgment. *Cartledge* v. *Eyles*, *Bart. Earnes* 442.

Want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded if he appear at the trial and make defence. *Salk.* 646.

A material witneſs for the defendant was concealed in the plaintiff's houſe to avoid being ſerved with a *ſubpoena*, by which the plaintiff obtained a verdict, which was ſet aſide without coſts, it being unreaſonable for the plaintiff to carry the cauſe down to trial, knowing the defendant could not make a defence. *Montpeſſon* v. *Randle*, *Hilary*, 20 *Geo.* 2. *Bull. Ni. Pri.* 328.

On motion for a new trial, a rule is commonly granted to ſhew cauſe, and the *puiſne* judge of the court obtains from the judge who tried the cauſe, if of another court, a report of the trial, and of his ſentiments; and if he is ſatisfied with the verdict, it hath not been uſual to grant a new trial on account of the verdict being againſt evidence; but if the judge be diſſatisfied, it is moſtly of courſe to grant a new trial.

On a new trial there is no occaſion to have the record of *niſi prius* reſealed, or to have freſh ſtamps, for the firſt verdict is quite expunged, and the record remains as if no trial had ever been.

On a motion for a new trial, the *poſtea* was brought into court, and after a new trial had been denied, could not be found. On debate, the court ordered a new one to be made out from the record above, and the aſſociate's notes. *Stra.* 1264.

No amendment will be allowed in the record after new trial is granted. 2 *Blackſt. Rep.* 920.

The rule is to ſhew cauſe, it is therefore unneceſſary to give notice of the motion to the oppoſite party; but he muſt be ſerved with a copy of the rule when drawn up; and the day before it comes on to be heard, notice given to the chief juſtice's clerk, judge's clerk, who tried the cauſe, to bring his book to Weſtminſter, or if it be a judge of another court, to the clerk for the judge's report as ſoon as

a new trial is moved for, who will deliver it to the *puiſne* judge of the court where the cauſe was commenced.

If the verdict ſhould be ſet aſide, the rule for a new trial muſt be drawn up, and ſerved, and if it be on payment of coſts, they muſt be forthwith paid, the rule being conditional; the *niſi prius* record is not to be engroſſed anew, but the *jurata* muſt be altered as to the return, and the record muſt be paſſed again; no new entries are made or paid for, but a new *diſtringas* muſt be ſued out.

Chap. XXIV.

Of entering and docquetting judgments.

THE roll, or entry of the iſſue, or pleadings between the parties, is to be fairly wrote, with a ſtrong hand on parchment cut out for the purpoſe, leaving a margin of an inch, and room for the preſs. *Rule, Hill.* 1657.

All the pleadings are to be entered on the roll, and when occaſion to turn over, began over againſt the firſt line of the warrant of attorney, leaving an inch margin.

If there be an iſſue joined between the parties, the roll muſt be filed of that term in which the iſſue is joined.

If an interlocutory judgment is ſigned, the term, in which ſuch judgment is ſigned, muſt be inſerted on the roll.

On judgment on confeſſion, or by warrant of attorney, the term when ſigned muſt be inſerted, thus: "As yet of Trinity term in the 23d year of the reign of king George the Third, witneſs *William* earl Mansfield." Then are entered the warrants of attorney for the plaintiff, and defendant, with a memorandum; but if the plaintiff be non-proſſed, either for want of declaring, replying, or entering his iſſue on record, then the defendant's warrant of attorney only is entered on the roll, the plaintiff being out of court.

Two

Two days before every eſſoign day of the term, are allowed to *docquet* and carry in the rolls of the preceding term; therefore theſe entries are generally made at leiſure, and if not done, a *poſt terminum* of 4*s.* 8*d.* is paid for the number, and 1*s.* more to the clerk of the judgments.

The clerk of the judgments, King's Bench office, (if it is in the ſame term the iſſue is entered, or judgment ſigned,) with whom the number rolls are left, will deliver as many numbers as are wanted; the attorney's name muſt be ſubſcribed on the docquet, and he is to make out the docquet paper; the roll is then carried to the clerk of the judgments, and he will enter it.

Docquet paper.

The entry of *A. B.* gent. of term, 23 *Geo.* 3. *Middleſex.* Judgment in between *William White*, plaintiff, and *Benjamin Black*, defendant, for fifty pounds damages, and coſts twenty pounds.

Roll 500.

If the attorney hath more judgments they are entered in due order.

This paper with the roll which is numbered at the bottom in this manner;

Stormont and *Way.*

Roll 500.

is taken to the clerk of the judgments, who will mark them, paying 3*s.* then to the *niſi prius* office from which it will be filed in the Treaſury.

If the roll is already carried in, which is often the caſe after iſſue joined, and before trial, and which the defendant may compel the plaintiff to do, by ſerving him with a rule to enter the iſſue, the *poſtea* or inquiſition with the maſter's *allocatur* thereon is carried to Weſtminſter to the treaſury, and the clerk on leaving it will enter up the judgment on the roll, paying him two ſhillings.

" No judgment not docqueted and entered in the " books, ſhall affect any lands or tenements as to

"purchaſors or mortgagees, or have any preference "againſt heirs, executors, and adminiſtrators, in the "adminiſtration of their anceſtors, teſtators or in "teſtate's eſtates." 4 & 5 *W. & M. c.* 20. *ſ.* 3.

It is to be wiſhed that the legiſlature would interfere, by way of penalty, upon the attornies for not carrying in their rolls; or the court make a rule to enforce them to be fied of record at the times mentioned in the rules, as it tends to great inconvenience, and makes the young practiſer very ignorant in his profeſſion, for by making the entries compleat, he thereby gets properly ſkilled in the art of good pleading. *Vide* 2 *Burr.* 1723

If the plaintiff hath judgment otherwiſe than by verdict, on a ſuit by original, his attorney ſhould make out a *præcipe* for an original returnable on the firſt return of that term in which there is judgment in an action ſounding in damages, which the curſitor of the county muſt have on or before the eſſoign day of the ſubſequent term; for he cannot make out an original writ of a return paſt after that, without a ſpecial order from the court of chancery; this writ when made out is returned of courſe and filed with the *cuſtos brevium*, and warrants of attorney muſt be alſo filed.

The entry upon the roll is not the warrant of attorney but only the memorandum of it.

The proper officers of the courts of king's bench, common pleas, and exchequer, are liable to a penalty of one hundred pounds; half to the party grieved, and half to any one who ſhall ſue, upon any neglect as to docquetting judgments according to the directions. *Stat.* 4 & 5 *W. & M. c.* 20.

Attornies ſhall bring in the rolls of every Trinity, Michaelmas and Hilary terms before the eſſoign day of the ſubſequent term, and the rolls of Eaſter before the firſt day of Trinity term following. *Rule, Mich.* 5 *Ann.*

But the *cuſtos brevium* attends the day but one before every term, to receive and file the rolls.

On motion a new roll was ordered to be filed, the former being loſt; for there being a docquet of it, it could be no deceit upon purchaſors. *Str.* 833.

If

If the defendant has either a freehold, or leaſehold eſtate in Middleſex or Yorkſhire, the judgment may be regiſtered, which will affect them from the day of the regiſtering.

A memorial of a judgment.

A memorial to be regiſtered purſuant to the ſtatute, &c.

Of a judgment in his majeſty's court of king's bench of Hilary term, in the 23d year of the reign of king George 3. between *William White*, plaintiff, and *Benjamin Black*, defendant, in a plea of debt for 100*l.* and 63*s.* damages.

I do hereby certify that judgment was ſigned in the above cauſe the day of 1783.

Edward Benton.

This memorial muſt be ingroſſed on parchment, ſtamped with a treble ſix-penny ſtamp, and taken to the maſter of the king's bench office, who will, on ſeeing the *poſtea*, inquiſition, or judgment paper, ſubſcribe the certificate, an affidavit of which muſt be made before a judge of the court in which the judgment is obtained, or a maſter in chancery, and it is then filed with the regiſter of the proper county. In Middleſex the office is in Bell yard, Temple-bar, fileing 5*s.*

Affidavit.

E. J. clerk to *A. B.* of, &c. gentleman, maketh oath and ſaith, that he was preſent, and did ſee Edward Benton, Eſq. ſecondary of the court of king's bench, ſign the certificate of the judgment in the memorial above mentioned.

Sworn, &c.

If the cauſe be not tried the ſame term the iſſue is delivered, the *venire* muſt be continued on the rolls, by *vicecomes non miſit breve*; as ſuppoſing an iſſue joined in Eaſter term, and the cauſe not tried until Trinity; then after the award of the firſt *venire* "the ſame day is given to the parties aforeſaid, at the ſame place." is added, "At which day before our lord the king, at Weſtminſter, came the parties aforeſaid, by their attornies aforeſaid; and the ſheriff did not return the ſaid writ, nor did he do any thing thereupon; Continuance.

on

on; therefore let a jury thereupon come before our lord the king, at Weſtminſter, on Friday next after the morrow of the holy Trinity, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. the ſame day is given to the parties aforeſaid, at the ſame place." And if it be to Michaelmas term, a new *venire* is awarded over to the firſt day, at which day, &c. as above, in the ſame manner from term to term until the cauſe is tried, the roll then proceeds in this manner.

Afterwards the proceſs being continued between the parties aforeſaid, of the plea aforeſaid, by the jury being reſpited between them, before our lord the king, at Weſtminſter, until (the return of the *diſtringas*), unleſs the king's right truſty and well beloved *William* earl Mansfield, his majeſty chief juſtice, aſſigned to hold pleas before the king himſelf, ſhall firſt come (on the day mentioned in the *jurata*), at Weſtminſter-hall, in the ſaid county; (if in London, at Guildhall, in the city of London; if at the aſſizes, unleſs his majeſty's juſtices aſſigned to hold aſſizes ſhall firſt come on in the ſaid county,) according to the form of the ſtatute in ſuch caſe made and provided, for default of the jurors, becauſe none of them did appear; at which day before our lord the king, at Weſtminſter, comes the aforeſaid *William* by his ſaid attorney, and the ſaid chief juſtice (or the ſaid juſtices of our lord the king) before whom the ſaid iſſue was tried, ſent hither his record had in theſe words—Afterwards, that is to ſay, &c. (here the *poſtea* is entered verbatim from the record,) after which follows the judgments. It is therefore conſidered that the ſaid *William*, recover againſt the ſaid *Benjamin* his ſaid damages, by the ſaid jury, in form aforeſaid aſſeſſed; and alſo twenty-five pounds for his coſts and charges, by the court of our ſaid lord the king, now here adjudged, to the ſaid *William* by his aſſent, by way of increaſe, which damages in the whole amount to ſeventy-five pounds, and that the ſaid *Benjamin* be in mercy, &c.

Judgment in caſe.

Judgment in debt.

It is therefore conſidered, that the ſaid *William* recover againſt the ſaid *Benjamin* his ſaid debt, and the

the aforesaid damages, by the said jury in form aforesaid assessed, and also twenty-five pounds for his costs and charges, by the court of our said lord the king, now here adjudged of increase to the said *William* by his assent, which damages in the whole amount to twenty five pounds and twelve pence, and the said in mercy, &c.

Cognovit actionem in case.

And the said *Benjamin* by *C. D.* his attorney, comes and defends the wrong and injury, when &c. and says that he cannot deny the said action of the said *William* nor but that he did undertake, and promise, in manner and form as the said *William* hath above complained against him, nor but that the said *William*, hath sustained damages, by occasion of the non-performance of the said several promises and undertakings to fifty pounds, as he the said *William* hath above, in his said declaration supposed; and thereupon the said *William* prays that the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him. Therefore it is considered, that the said *William* recover against the said *Benjamin* his damages aforesaid, so by him acknowledged, and also ten pounds for his costs and charges, by the court of our lord the king now here adjudged to the said *William* by his assent, which said damages in the whole amount to sixty pounds, and the said *Benjamin* in mercy, &c.

For the plaintiff judgment on demurrer to the replication in case.

At which day, before our lord the king at Westminster, came the parties aforesaid, by their attornies aforesaid; and hereupon the premises being seen by the said court, and fully understood, it appears to the said court, that the said plea of the said *William*, by way of reply to the said plea of the said *Benjamin*, and the matters therein contained, are sufficient in law for the said *William* to have and maintain his said action against the said *Benjamin*, as the said *William* hath above alledged, for which the said *William* ought to recover his damages, by occasion of the premises; but because it is unknown to the court of our lord the king now here, what damages the said *William* hath sustained by the means aforesaid, the sheriff is commanded, &c. (award of writ of enquiry.)

And

Judgment for the plaintiff for want of a rejoinder.

And the ſaid *Benjamin* prays a day to rejoin to the ſaid replication, and it is granted to him, &c. and hereupon a day is given to the parties aforeſaid, before our lord the king at Weſtminſter, until for him, the ſaid *Benjamin* to rejoin, &c. at which day, before our ſaid lord the king at Weſtminſter, the ſaid *William* by his ſaid attorney, comes and the ſaid *Benjamin* (although ſolemnly demanded) doth not come, but makes default, whereby the ſaid *William* remains therein undefended againſt the ſaid *Benjamin*, therefore it is conſidered, that the ſaid *William* recover againſt the ſaid *Benjamin* his ſaid debt, and alſo five pounds for his damages which he hath ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in this behalf laid out, adjudged to the ſaid *William* by the court of our ſaid lord the king, now here by his conſent, and the ſaid *Benjamin* in mercy, &c.

Judgment of nonſuit for not proceeding to trial.

At which day, before our lord the king at Weſtminſter, comes the ſaid *Benjamin* by his ſaid attorney, and the ſaid *William* (although ſolemnly called) cometh not; and it appearing to the court of our ſaid lord the king now here, that the ſaid *William* hath neglected to bring the iſſue above joined on to be tried, according to the courſe and practice of the ſaid court of our ſaid lord the king now here; therefore, according to the form of the ſtatute in ſuch caſe made and provided, it is conſidered by the ſaid court, that the ſaid *William* take nothing by his ſaid bill, but that he and his pledges for proſecuting, to wit, *John Doe*, and *Richard Roe*, be in mercy, &c. and that the ſaid *Benjamin* go thereof without day. And it is further conſidered that the ſaid *Benjamin* recover againſt the ſaid *William* twenty-five pounds for his coſts and charges by him about his defence in this behalf ſuſtained, adjudged by the court of our lord the king now here, to the ſaid *Benjamin* at his requeſt, according to the form of the ſtatute in that caſe made and provided, and that the ſaid *Benjamin* have his execution thereof, &c.

At

At which day, before our lord the king at Weſtminſter, came the parties aforeſaid, by their attornies aforeſaid, and the ſheriff did not return the ſaid writ, nor did he do any thing thereon; therefore, as before, let a jury thereupon come before our lord the king at Weſtminſter, on twelve, &c. by whom, &c. and who neither, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid, at the ſame place. At which day, before our lord the king at Weſtminſter, came the parties aforeſaid in the plea aforeſaid, and the ſheriff did not return the ſaid writ, nor did he do any thing thereon; whereupon the ſaid *Benjamin* prays the court of our ſaid lord the king, that the ſaid *William* may enter the iſſue joined between the ſaid parties, whereupon the ſaid *William* is ordered by the court of our ſaid lord king here, that he enter the ſaid iſſue joined on (the day of the rule given) in this ſame term, on the peril attending the neglect thereof, the ſame day is given to the ſaid *Benjamin* there, &c. at which day, before our ſaid lord the king at Weſtminſter, comes the ſaid *Benjamin* by his ſaid attorney, and the ſaid *William* (although ſolemnly called) cometh not, but makes default, nor hath he entered the iſſue joined in the plea aforeſaid; therefore it is conſidered by the court here, that the ſaid *William* take nothing by his aforeſaid bill, but that he and his pledges to proſecute be amerced, and that the ſaid *Benjamin* may depart the court here without day; for ever diſmiſſed therefrom. It is alſo conſidered by his majeſty's ſaid court here, that the ſaid *Benjamin* recover againſt the ſaid *William* five pounds for his coſts and charges by him, about his defence, in this behalf ſuſtained, adjudged by the ſaid court of our ſaid lord the king now here, to the ſaid *Benjamin* by his aſſent, according to the form of the ſtatute in ſuch caſe made and provided, and that the ſaid *Benjamin* have execution thereof, &c.

Judgment of *nonpros* for not entering iſſue.

At which day, before our lord the king at Weſtminſter, came the parties aforeſaid, by their attornies aforeſaid, and the ſaid *Benjamin* hath not here in

On replication of *nul tiel record.*

court the record of the ſaid judgment by him above in his plea aforeſaid alledged, but makes default of producing the ſaid record: therefore it is conſide ed that the ſaid *William* ought to recover his damages by reaſon of the premiſes, but becauſe it is unknown to the court of our ſaid lord the king now here, what damages the ſaid *William* hath ſuſtained, the ſheriff is commanded, &c. (award of enquiry.)

Entry of retraxit after pleas and confeſſion.

The defendant's attorney muſt go before the maſter, and conſent to the plea being withdrawn, all the proceedings are entered on the roll, to the end of the iſſue, it then proceeds:

At which day, before our lord the king at Weſtminſter, come the parties aforeſaid, by their attornies aforeſaid, and thereupon the ſaid *Benjamin*, by his ſaid attorney, relinquiſhing his ſaid averment by him in pleading alledged, ſaith, that he cannot deny the ſaid action of the ſaid *William*, not but that he did undertake and promiſe, in manner and form, as the ſaid *William* hath above complained againſt him, for which he the ſaid *William* ought to recover his damages, by occaſion of the premiſes; but becauſe it is unknown what damages the ſaid *William* hath ſuſtained, the ſheriff is commanded, &c. (award of enquiry.)

Chap. XXV.

Of judgment by default, and of the writ of inquiry.

ON the defendant's not pleading according to the rules of the court, or not defending the action, the plaintiff may ſign judgment.

In an action for damages this judgment is only interlocutory, becauſe ſuch damages muſt be aſcertained by a jury; but in debt, judgment by default, or confeſſion, or on demurrer, is final, as admitting the preciſe demand in the declaration.

Manner

Manner of ſigning judgment by default.

Firſt is entered upon the roll warrants of attorney for the plaintiff and defendant, and a memorandum of the term in which the declaration was delivered or filed, then on a treble penny ſtamped paper is entered the memorandum only, which is taken to the clerk of the judgments in the king's bench office, who will ſign the ſame, and mark the roll and judgment paper, paying him the four pence *per* ſheet, and eight pence filing the warrants of attorney; if the action be in debt, the judgment is to be entered on a double half crown ſtamp, the entry on the roll is as before, and in this caſe the coſts may be taxed with the the maſter, and taken out immediately.

An interlocutory judgment, although regularly ſigned, may be ſet aſide, ſo as to let in the defendant to try the merits of the caſe; but it is always on payment of coſts, and the merits muſt appear unto the court upon affidavit. *Str.* 823. 1242. 1 *Bur.* 568.

A writ of inquiry was ſet aſide, and the defendant let in to plead a fair plea on payment of coſts, *Salk.* 518. 6 *Mod.* 191. but as the rule is conditional, the coſts muſt be immediately paid.

If the plaintiff ſigns an interlocutory judgment irregularly, the court will ſet it aſide upon an affidavit of the facts, which affidavit muſt ſet forth the exact ſtate of the proceedings; or if the parties were upon terms of accommodation, ſhew the real caſe and the advantage taken; and as the rule is to ſhew cauſe, no notice of motion is neceſſary.

If the defendant pleads a plea in abatement, after he has obtained an order for time to plead, the plaintiff may demand a plea in chief, and if none is filed or delivered, may ſign judgment.

It is not neceſſary to demand a plea afreſh after the defendant hath had a judge's order for time to plead; but after it is expired, the plaintiff may ſign judgment, if no plea.

If defendant pleads a judgment recovered in another court, after having had a judge's order for time

to plead, the plaintiff may ſign judgment, as it is not ſuch an iſſuable plea as is required by the the terms of the order.

Where there are iſſues in fact, and in law, the plaintiff may waive the iſſues in fact, and take out an inquiry upon the demurrer after the judgment is given by the court; and he has no occaſion to enter a *nolle proſequi* as to the iſſues in fact, until he enters up his final judgment on inquiry. *Str.* 532.

But if the plaintiff will carry the iſſues in fact to trial before the demurrer is determined, he ought to take out a *venire, tam* to try the iſſue, *quam* to inquire of the damages upon the demurrer; and in that caſe the jury is to give contingent damages. *Ibid.*

But where the plaintiff waves the iſſues in fact, and executes his inquiry upon the demurrer, he muſt, when he enters final judgment, enter a *nonpros* upon the roll as to the iſſue in fact, otherwiſe the defendant may take advantage on a writ of error.

In an action upon the caſe, upon a promiſſory note, the defendant pleaded, by leave of the court, *non aſſumpſit*, and *non aſſumpſit infra ſex annos*; the plaintiff took iſſue upon the *non aſſumpſit*, and replied an original as to the *non aſſumpſit infra ſex annos*, and thereupon iſſue was joined upon *nul tiel record*. On the laſt iſſue the plaintiff obtained judgment, and then proceeded to execute a writ of inquiry without trial of the firſt iſſue. The defendant moved to ſet aſide the writ of inquiry; and the court, upon hearing counſel, ordered the writ, and the inquiſition taken thereon to be ſet aſide. *Prior* v. *Earl of Iſlay*, *Barnes* 229.

In treſpaſs, or aſſault and battery, againſt two, if the one confeſſes, and the other pleads to iſſue, the practice now is, to iſſue the writ of enquiry, ſo that the ſame jury which tries the iſſue aſſeſſes the damages; and in caſe the defendant who pleaded is acquitted, yet ſhall the plaintiff go on to aſſeſs the damages againſt the other. *Stra.* 1222.

But otherwiſe if the plaintiff be nonſuited. *Stra.* 507.

If

If one defendant appear, and the plaintiff declare againſt him *ſimul cum, &c.* who pleads and is found guilty by the inqueſt to damages, and afterwards the other comes and pleads, and is found guilty, he ſhall be charged with the damages taxed by the former inqueſt; for the treſpaſs which the plaintiff has made joint, cannot be ſevered by the jury, if the jury find the treſpaſs to be done by all at one and the ſame time; but if the jury find one guilty at one time, and the other at another, then ſeveral damages may be aſſeſſed. 11 *Co.* 5.

After interlocutory judgment and writ of inquiry awarded, the plaintiff became a bankrupt, and afterwards the inquiry was executed in his own name, and held good, without a *ſcire facias* ſued out by the aſſignees. 2 *Wilſ.* 358.

A writ of inquiry was executed and coſts taxed upon it; but no final judgment entered up. There being occaſion to prove the debt in chancery the writ of inquiry could not be found; and a rule was made for a new writ and inquiſition according to the ſheriff's notes, and that the maſter ſhould indorſe the coſts which appeared by the commitment book to be taxed. *Bean* v. *Elton*, *Stra.* 1077.

If a writ of inquiry be executed before the chief juſtice, and a witneſs wanted, he may adjourn it over if he pleaſes, to the next ſitting, *Str.* 813. but it muſt be on payment of coſts.

If the writ of inquiry be ſet aſide for irregularity, there muſt be a new writ. *Hil.* 13 *Geo.* 1. *Cole* v. *Vaughan.*

If the jury miſtake in point of law, or give too ſmall damages, the court will, on payment of coſts, order a new writ. *Str.* 425. 1259.

An inquiry executed on the day of the return is good. *Ld. Raym.* 1449.

Notice of executing a writ of inquiry, if the defendant lives within forty miles of London or Middleſex, and the *venue* be laid in either of thoſe places, muſt be given eight days excluſive of the day it is delivered; but if the defendant lives above forty miles from London, and the *venue* is laid there, or in Middleſex, then fourteen days notice, excluſive of the

the day, muſt be given; and if the *venue* be laid in the country, then ten days excluſive is to be given; and Sunday is to be accounted as one, if it be not the day on which the notice is given, *R. M.* 4 *Ann.* 12. *Mod.* 21. *Stat.* 14 *Geo.* 2. *c.* 17. *ſ.* 4

The notice of executing the writ of inquiry is ſubject to the ſame rules as a notice of trial; and therefore, in caſe there have been no proceedings for four terms, after interlocutory judgment ſigned, a whole term's notice of inquiry muſt be given, which muſt be delivered before the eſſoign day, unleſs the cauſe has been ſtayed by injunction, &c. *M.* 4 *Ann.* *Str.* 1100.

In every caſe where the plaintiff ſhall conclude to the country upon the defendant's plea, and ſhall give notice of trial of the iſſue, upon the paper-book, and thereupon the defendant, to hinder the trial of the iſſue, ſhall demur in law upon the replication, or plea of the plaintiff, and the plaintiff ſhall join in ſuch demurrer and thereupon ſhall obtain judgment, the attorney for the defendant ſhall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper-book; but then the plaintiff ought to give notice of the hour and place of executing the inquiry, *R. Hil.* 8 *Geo.* 1,

Notice of executing a writ of inquiry.

In the king's bench.

William White, plaintiff,
Benjamin Black, defendant.

Take notice that a writ of inquiry of damages in this cauſe, will be executed on the day of inſtant, between the hours of ten and twelve of the clock in the afternoon of the ſame day, at the Guildhall of London, dated this day of 1783. Your's, &c.

A. B. plaintiff's attorney.

To Mr. *C. D.* attorney for defendant.

If in Middleſex, and in term time, "at the Guildhall in King's-ſtreet, Weſtminſter, in the county

county of Middlesex;" if in vacation, or in the afternoon in term, "at the sheriff's office in Took's court, Cursitor-street, Chancery-lane, in the county of Middlesex."

If in the country, "at the house of commonly called or known by the name or sign of the in in the said county."

If no attorney appears for the defendant, the notice is to be directed to him, and leaving the same at his house will be sufficient.

If the plaintiff doth not intend executing the inquiry on the day, he may countermand the same, by giving notice two days exclusive, before the day of executing, if in town, and the defendant lives within forty miles of London; but if he lives above forty miles, then six days notice of countermand at least must be given. *Stat.* 14. *G.* 2. *c.* 17.

A notice of enquiry may be continued over to another day, but not more than once in a term, *Str.* 1119. and may be continued the day before it is executed to any other day.

Notice of countermand.

I do hereby countermand the notice of executing the writ of inquiry given you in this cause, dated, &c.

Notice of continuance.

I do hereby continue the notice of executing the writ of inquiry given in this cause, to the day of, next, when the same will be executed between the same hours, and at the same place, dated, &c.

Costs may be recovered for not executing a writ of inquiry, the same as for not going to trial, *Str.* 728.

Writ of inquiry.

George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriffs of London, greeting, Whereas *William White*, lately in our court before us at Westminster, by bill without our writ, impleaded *Benjamin Black*, being in the custody of the

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marſhal of the Marſhalſea of our lord the now king, before the king himſelf: for that whereas (here the whole declaration is ſet forth verbatim) to the ſaid *William*, his damage of fifty pounds, as he ſaith, and ſuch proceedings were thereupon had in our ſaid court before us, that the ſaid *William* ought to recover his damages by means of the premiſes, but becauſe it is unknown to our court before us, what damages the ſaid *William* hath ſuſtained by means of the premiſes, therefore we command you, that by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the ſaid *William* hath ſuſtained, as well by means of the premiſes, as for his coſts and charges by him about his ſuit in this behalf expended, and make appear to us at Weſtminſter, on , the inquiſition which you ſhall thereupon take under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition, and have there then this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the twenty-third day of January, in the twenty-third year of our reign.

Stormont and *Way*.

This writ is to be engroſſed on a 2*s*. ſtamp parchment, and only ſealed, paying 7*d*. and is left at the ſheriff's office for execution, firſt indorſing on it, the day it is to be executed, paying in London 1*l*. 9*s*. 4*d*. and 4*d*. for every witneſs, in Middleſex 1*l*. 10*s*. 4*d*. other countries 1*l*. 11*s*. 6*d*.

On the day of the return, a rule muſt be given for judgment at the clerk of the rules, in this form.

William White,
In the King's Bench. againſt
Benjamin Black.

Rule for judgmeut on inquiry.

For which is paid 1*s*. 10*d*. this expires in four days next after given. Sunday (or any holiday on which the court does not ſit) is not reckoned a day, unleſs the rule is given on the laſt day of term, or after. When the inquiſition is had from the ſheriff, it muſt be taken to the

the ſtamp-office, and ſtamped with a double 2*s.* 6*d.* the coſts are then to be taxed with the maſter, paying 2*s.* 6*d* and the defendant may have a rule to be preſent, if he thinks fit; at the clerk of the rules paying 4*s.* after this plaintiff may take out execution, if ſerved with no allowance of a writ of error.

Subpœna *on inquiry.*

George the third, &c. to (here are to be inſerted the witneſſes names, and there may be four in each writ) we command you, and every of you, that ſetting aſide all and ſingular buſineſſes and excuſes whatſoever, you, and every one of you, be and appear in your proper perſons, before our ſheriff of Middleſex, on the day of next, at the ſheriff's office in Took's-court, Caſtle-yard, in the county of Middleſex (if in London "before the ſheriffs of the city of London, at the Guildhall of the ſaid city;" if in the county, "before Eſq; ſheriff of the country of at the houſe of commonly called or known by the name or ſign of the in in the ſaid county,") there to teſtify the truth of all and ſingular thoſe things according to the beſt of your information and knowledge, which you, or any of you know, in a certain cauſe now depending in our court before us, between *William White*, plaintiff, and *Benjamin Black*, defendant, of a plea of treſpaſs on the caſe, (or as the nature of the action is) on which our certain writ of inquiry of damages has been ſent by us, out of our ſaid court, and directed to the ſaid ſheriff, then and there in due form of law to be executed before the ſaid ſheriff, and this you, nor any of you, ſhall in no wiſe omit, under the penalty of 100*l.* Witneſs *William* earl Mansfield, at Weſtminſter the day , in the year of our reign.

Stormont and *Way.*

This *ſubpœna* muſt be ingroſſed on a 2*s.* 6*d.* ſtamped piece of parchment. It muſt be ſigned and ſealed; paying ſigning, 1*s.* 8*d.* ſealing 7*d.*

Præcipe.

London, to wit, *ſubpœna* to teſtify on inquiry between *William White*, plaintiff, and *Benjamin Black*, defendant, on the part of the plaintiff.

A. B. attorney.

A Subpœna *ticket on a writ of inquiry.*

Mr.

By virtue of a writ of *ſubpœna* to you directed, and herewith ſhewn unto you, you are perſonally to be, and appear before the ſheriff of the county of on the day of inſtant, at ten of the clock, in the forenoon, of the ſame day at the houſe of in the ſaid county, then and there to certify the truth, according to your knowledge, upon a writ of inquiry of damages to be then and there executed, in a certain cauſe now depending, between *William White*, plaintiff, and *Benjamin Black*, defendant, in a plea of in the part of the plaintiff, and this you are not to omit under pain of one hundred pounds, dated the day of in the twenty-third year of the reign of our ſovereign lord George the Third, by the grace of God, of Great Britain, France, and Ireland, king defender of the faith, and ſo forth, and in the year of our Lord one thouſand ſeven hundred and eighty-three.

By the court.

Each witneſs muſt be paid one ſhilling, on being ſerved with the *ſubpœna* ticket, and the witneſs may inſiſt upon their reaſonable expences as upon trials.

A motion to ſet aſide judgment, whether ſigned regularly or irregularly, muſt be made two days before the day appointed for executing a writ of enquiry.

A writ of inquiry cannot be executed on a Sunday, as it is within the ſtatute. 29 *Car.* 2. *c.* 7. and the court is bound to look into the almanack. *Stra.* 387.

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An enquiry executed on the return day of the writ, is good, *Lord Raym.* 1449.

Damages were given for more on the writ of inquiry, than laid in the declaration, and on error, the judgment was reverſed. *Baker* and *Bock*, *Lord Raym.* 1382.

A note of hand muſt be proved on a writ of inquiry, although declared upon in the action. *Snowden* and *Thomas*, *Hil.* 11 *Geo. C. B.* 2 *Black*, 748.

Intereſt is due and may be aſcertained on executing a writ of inquiry, upon all liquidated ſums, from the inſtant, the principal becomes due, as bills of exchange, notes payable on a certain day, notes on demand after demand made, money lent, and account ſtated. 2 *Black. Rep.* 761. *Barnes* 268.

But not upon goods ſold and delivered, they being uſually ſold upon credit, of three or ſix months, or an indefinite time, nor is the ſum liquidated until the jury ſend the value.

If the writ of inquiry is not executed accordiug to notice, the defendant ſhall have coſts.

Chap. XXVI.

Of Execution.

IF the judgment of the court be not ſuſpended or reverſed, the ſuit is decided, and the next ſtep is the execution of that judgment.

This is done by a writ to the ſheriff, iſſuing from the court in which judgment was given, and granted at the requeſt of the party who hath obtained ſuch judgment, to give him that ſatisfaction, to which he now appeareth by the deciſion of the law to be entituled.

There are three ſorts of executions at preſent generally in uſe, in perſonal actions, of either of which the plaintiff hath his election, but he cannot purſue different ſorts of execution at the ſame time.

Theſe executions are a *capias ad ſatisfaciendum*, a *fieri facias*, and an *elegit*.

A *capias ad ſatisfaciendum* is a writ directed to the ſheriff, commanding him to apprehend the defendant, and that he have him at Weſtminſter, on a day therein named, to make the ſatisfaction which hath been awarded; which, if he doth not then do, he muſt remain in cuſtody until he doth. This writ, and all other executory proceſs, may be ſued out for coſts againſt a plaintiff, as well as againſt a defendant, when judgment is had againſt him.

This writ, at common law, lay only in treſpaſſes *vi et armis*, wherein the *capias ad reſpondendum* was the immediate proceſs upon the original writ. But the *capias ad reſponden um* being given by ſeveral ſtatutes, as the *meſne* proceſs upon the original writ in other perſonal actions, the *capias ad ſatisfaciendum* hath become an executory proceſs in thoſe alſo; the rule being, that where a *capias* li s in proceſs before judgment, it will alſo lie in execution upon the judgment itſelf.

The *capias ad ſat'sfaciendum* doth not lie againſt privileged perſons, peers, or their wives, or members of parliament; nor againſt executors or adminiſtrators, or ſuch other perſons as could not originally be held to bail. And in 14 *Ed.* 3. a defendant was diſcharged from a *capias* becauſe he was of ſuch an advanced age *quod pœrem impriſonamenti ſubire non poteſt.* 1 Inſt. 289. an inſtance which proves that impriſonment for debt was then in the diſcretion of the court, not in that of the oppoſite party; and ſeems plainly to point out in the recovery of the uſe of ſuch diſcretion, an eaſy mode of regulating the cuſtom of impriſonment for debt, ſo as to retain the good effects and remedy the many evil ones of that practice.

The writ of *capias ad ſatisfaciendum* is an execution of the higheſt nature, and when the writ is once executed, no other proceſs can be ſued out againſt the goods or land; but by 21 *J.* 1. *c.* 24. if the defendant dies while in execution upon this writ, the plaintiff may ſue out a new execution againſt his lands, goods, or chattels.

The *fieri facias* is ſo called from containing the direction to the ſheriff *quod fieri faciat de bonis*, that he cauſe to be made of the goods and chattels of the

the defendant the ſum recovered. This writ lies againſt privi eged perſons, and againſt executors and adminiſtrators, with regard to the goods of the deceaſed. The ſheriff may not break open any outer doors to execute either the *capias ad ſatisfaciendum*, or the *fieri facias*, 5 Rep. 92. but if he enter peaceably, may break open any inner door in order to take the goods. If part only of the debt be levied upon a *fieri facias*, a *capias ad ſatisfaciendum* may iſſue for the remainder.

The *elegit* is a judicial writ given by the ſtatute *Weſt.* 2. 13 *Ed.* 1. *c.* 18. either upon a judgment for debt or damages, or forfeiture of a recognizance taken in the king's court; by this writ the defendant's goods and chattels are not ſold, but only appraiſed and delivered to the plaintiff at ſuch appraiſement; and if not ſufficient to ſatisfy the debt or damages, then one-half of his freehold lands which he had at the time of the judgment. 2 *Inſt.* 395. whether held in his own name, or in truſt for him, *Stat.* 29 *Car.* 2. *c.* 3. are to be delivered to the plaintiff to hold till the demand is ſatisfied out of the rents and profits, or the defendant's intereſt expired.

Copyhold land cannot be taken by *elegit*. Roll. Abr. 888.

This execution is of ſuch an high nature, that after it the body of the defendant cannot be taken; but if execution be had only of the goods becauſe there are no lands, and ſuch goods are not ſufficient to pay the debt, then a *capias ad ſatisfaciendum* may iſſue, as ſuch *elegit* is no more in effect than a *fieri facias*.

The writ of *levari facias* which commands the ſheriff to levy the debt upon the lands and goods of the defendant, whereby he may ſeize all his goods, and receive the rents and profits of his lands until ſatisfaction be made, *Finch* 471. is now in little uſe as the remedy by *elegit*, which takes poſſeſſion of the lands themſelves, is much more effectual. But when the ſheriff, upon a common execution returns that the party is a beneficed clerk, not having any lay fee, a writ goes to the biſhop of the dioceſe in the nature of a *levari*, or *fieri facias*. Regiſtr. orig. 300, Judic.

22. 2 Inſt. 4. to levy the debt or damage *de bonis eccleſiaſticis*, which are not to be touched by lay hands, and thereupon the biſhop iſſues a ſequeſtration of the profits of the benefice, directed to the churchwardens to collect the ſame, and pay them over to the plaintiff, until the full ſum be raiſed, 2 *Burn Eccl. Law*, 329.

By the ſtatute of frauds, 29 *Car.* 2. *c.* 3. a judgment ſhall not bind the lands in the hands of a *bona fide* purchaſer, but from the day of ſigning the ſame, which the ſtatute directs to be punctually entered upon the record; nor ſhall the writ of execution bind the goods in the hands of a ſtranger or purchaſer, but from the actual delivery to the ſheriff or other officer, who is to indorſe thereon the time of his receiving the ſame. *Skin.* 257.

All theſe writs which are ingroſſed on a 2*s.* 6*d.* ſtamped parchment, muſt be ſued out within a year and a day after the judgment is entered, otherwiſe the court, *prima facie*, concludes that the judgment is ſatisfied, but it will grant a writ of *ſcire facias* in purſuance of the ſtatute. *Weſtm.* 2. 13 *Ed.* 1. *c.* 45. for the defendant to ſhew cauſe why the judgment ſhould not be revived, and execution iſſue, or the plaintiff may bring an action of debt upon the judgment, which was the only method of revival at common law. *Co. Lit.* 290.

Capias ad ſatisfaciendum in debt.

George the third, by the grace of God of Great-Britain, France, and Ireland, king, defender of the faith, and ſo forth, to the ſheriff of Middleſex, greeting: We command you, that you take *Benjamin Black*, if he may be found in your bailiwick, and him ſafely keep ſo that you may have his body before us at Weſtminſter, on

to ſatisfy *William White* of one hundred pounds debt, which the ſaid *William* lately in our court before us, recovered againſt him, as alſo ſixty three ſhillings, which were adjudged to the ſaid *William*, in our ſaid court before us for his damages, which he ſuſtained, as well by means of the

the detaining the ſaid debt, as for his coſts and charges, by him about his ſuit in that behalf, expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and have you there then this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of , in the year of our reign.

Stormont and *Way*.

The attorney's name muſt be indorſed on the writ, and the levy-money one hundred and three pounds, three ſhillings, beſides poundage, officers fees, and other expences.

In debt the money due to the plaintiff, with the expences of the levy, poundage, and officers fees, are levied as being taken out of the penalty.

In caſe, the damages and coſts of the ſuit only are to be levied.

If the *capias ad ſatisfaciendum* iſſue after a *ſcire facias* after the words "as appears of record," is added, and whereof in our ſame court before us, it is conſidered, that the ſaid *William* have his execution againſt the ſaid *Benjamin* of the debt and damages aforeſaid, as likewiſe appears to us of record; and have there then this writ. Witneſs, &c.

If the action is by original, it muſt be returnable on a general return-day, "whereſoever we ſhall then be in England," as for inſtance, "on the morrow of All Souls."

Capias ad ſatisfaciendum in caſe.

George the third, by the grace of God of Great-Britain, France and Ireland, king, defender of the faith, and ſo forth, to the ſheriff of Middleſex greeting: We command you, that you take *Benjamin Black*, if he may be found in your bailiwick, and him ſafely keep, ſo that you may have his body before us at Weſtminſter,

to ſatisfy *William White* one hundred pounds, which the ſaid *William*, lately in our court before us at Weſtminſter recovered againſt the ſaid *Benjamin*, for his damages, which he ſuſtained

tained, as well by means of the not performing certain promiſes and undertakings lately made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him, about his ſuit in that behalf expended, whereof the ſaid *William* is convicted, as appears to us of record; and have there then this writ. Witneſs, &c.

Stormont and *Way*.

The coſts taxed are to be added to the ſum recovered, being conſidered as damages.

This is only to be indorſed for the ſum recovered, as no ſheriff's fees can be levied only out of a penalty, unleſs by agreement under a *cognovit*, in that caſe is added, "levy ten pounds, beſides &c. by agreement."

In treſpaſs. "Occaſioned by a certain treſpaſs lately committed againſt the ſaid *William* by him the ſaid *Benjamin*, alſo, &c."

In covenant. "Occaſioned as well by the breach of a certain covenant, lately made by the ſaid *Benjamin* to the ſaid *William*,

In ejectment. "Occaſioned as well by a certain treſpaſs, and ejectment, lately committed againſt the ſaid *William* by him the ſaid *Benjamin*, as alſo, &c."

If the defendant is not to be found in the county where the *venue* is laid, the firſt writ muſt be made out into that county, and returned by the ſheriff *non eſt inventus*; and a *teſtatum* fued out into the county where he is, the firſt writ may be returnable any day, even the day ſued out, for it is merely to ground the *teſtatum*. But a *teſtatum* is often ſued out in the firſt inſtance.

Teſtatum capias ad ſatisfaciendum.

George the Third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. to the ſheriffs of London greeting: We command you, that you take *Benjamin Black* if he may be found in your bailwick, and him ſafely keep

keep, ſo that you may have his body before us, at Weſtminſter, on to ſatisfy *William White*, one hundred pounds, which the ſaid *William* lately in our court before us recovered againſt the ſaid *Benjamin*, for his damages which he ſuſtained, as well by means of not performing certain promiſes and undertakings, lately made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him about his ſuit in that behalf expended; whereof the ſaid *Benjamin* is convicted, as appears to us of record: And whereupon our ſheriff of Middleſex, hath made a return to us at a certain day now paſt, that the ſaid *Benjamin* was not found in his bailiwick, and thereupon on the behalf of the ſaid *William*, it is ſufficiently atteſted in our court before us, that the ſaid *Benjamin* doth lurk, and ſecrete himſelf in your county, and have there then this writ. Witneſs, &c.

Stormont and *Way*.

To ſatisfy us, and *William White*, who ſues as well for us as himſelf, in this behalf, five hundred pounds debt, which the ſaid *William* who ſues as aforeſaid, lately in our court before us, at Weſtminſter, by bill, without our writ, and by the judgment of the ſame court, recovered againſt the ſaid *Benjamin*, that is to ſay, one moiety thereof, to wit, the ſum of two hundred and fifty pounds, to the aforeſaid *William*, who proſecutes as aforeſaid, to his own proper uſe, and the other moiety thereof to our own proper uſe, according to the form of the ſtatute in ſuch caſe made and provided, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and have there then this writ. Witneſs, &c. In *qui tam*.

Stormont and *Way*.

To ſatisfy *Benjamin Black*, fifteen pounds, awarded to the ſaid *Benjamin* according to the form of the ſtatute in that caſe made and provided, in our court before us, for his expences and coſts, in a certain action of (as the action is) againſt the ſaid *Benjamin* at the ſuit of the ſaid *William* for that the ſaid *William* For the defendant on *nonpros*.

hath not profecuted his ſaid action; and have you there then this writ. Witneſs, &c.

Stormont and *Way*.

For an adminiſtator in debt.

To make ſatisfaction to *William White*, gentleman, adminiſtrator of all and ſingular the goods and chattels, rights and credits, which lately were of and belonging to *John White*, eſquire, deceaſed, who died inteſtate for one hundred pounds debt, and alſo fifteen pounds, (the coſts allowed) for his damages which he ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his expences and coſts, laid out by him, in proſecuting the ſaid ſuit, and whereof the the ſaid *Benjamin* is convicted, as appears to us of record; and have there then this writ. Witneſs, &c.

Stormont and *Way*.

There needs not fifteen days between the *teſte* and return of any *capias ad ſatisfaciendum* except againſt bail or in an outlawry.

Of the fieri facias.

The *fieri facias* iſſues only into the county where the *venue* is laid. If the goods be in another county, a *teſtatum fieri facias* muſt be made out.

If the *fieri facias* is ſued out in term time, it muſt bear *teſte* the firſt day of the term (although the judgment is not ſigned till four days after); if out of term, the laſt day of the preceding term, and ſeven days between the *teſte* and return are ſufficient.

The *fieri facias* may be ſued out againſt peers as well as others, and if all the money is not levied, the writ muſt be returned before a ſecond execution can be made out, becauſe the ſecond is grounded upon the deficiency of the firſt. *Salk.* 318.

A *fieri facias* being executed fraudulently, a *fieri facias* at the ſuit of another afterwards, ſhall ſtand good, and be preferred. *Wilſ.* 44.

The ſheriff that began the execution ſhall end it, though he is out of his office, *Salk.* 323 And may ſell goods, after he is out of office, without a *venditioni exponas*. Lord Raym. 990.

If the ſheriff return, that he has levied the goods, and that they remain in his hands for want of buyers

ers, and continues in office, a *venditioni exponas* iſſues to make ſale thereof, by which he is compelled to make ſale; but if he does not, a *diſtringas*, directed to the coroner, muſt be ſued out, to diſtrain the ſheriff for that purpoſe. If the ſheriff is out of office before he makes ſale, then a *diſtringas*, directed to the new ſheriff muſt be ſued out to compel the old ſheriff to ſell; or the party may move for iſſues againſt him to the value of the goods. 6 *Mod.* 295, 296.

On a *fieri facias*, upon a judgment againſt one partner, the ſheriff may take the goods of both, and the vendee ſhall have a moiety in common with the other. *Comb.* 217.

The *fieri facias* does not abate by the plaintiff's death, but the ſheriff muſt go on to execute his writ. *Mod. Ca. L. Eq.* 235. *Salk.* 322. 6 *Mod.* 290.

A landlord is intituled to a year's rent in the caſe of an execution, without deduction, and the ſheriff muſt take care of him, 8 *Ann. c.* 14. But a ground landlord cannot come in for a year's rent on an execution againſt an under leſſee, for the ſtatute only extends to the immediate landlord. *Str.* 787.

Fieri facias *in caſe.*

George the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the ſheriffs of Middleſex, greeting: We command you that, of the goods and chattels of *Benjamin Black* in your bailiwick, you cauſe to be made fifty pounds, which *William White*, lately in our court before us at Weſtminſter, recovered againſt the ſaid *Benjamin* for his damages which he ſuſtained, as well by means of the not performing certain promiſes and undertakings lately made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him about his ſuit in this behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and that you have that money before us at Weſtminſter, on

to render to the ſaid *William* for his damages aforeſaid, and that you have there then this writ. Witneſs,

William earl Mansfield, at Weſtminſter, the day of in the year of our reign *Stormont* and *Way*.

Fieri facias *in debt*.

George the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the ſheriff of Middleſex, greeting: We command you, that you cauſe to be made of the goods and chattels of *Benjamin Black* fifty pounds, which *William White* lately in our court before us at Weſtminſter, recovered againſt him for a debt, and alſo ſixty-three ſhillings, which were awarded to the ſaid *William* in our ſame court before us, for his damages which he ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his expences and coſts, laid out by him, about his ſuit in that behalf, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and have you the ſaid monies before us at Weſtminſter, on to render to the ſaid *William* for his debt and damages aforeſaid; and have there then this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the year of our reign. *Stormont* and *Way*.

After a *ſcire facias*, after, "As appears to us to us of record," is added "and whereof it is conſidered in our ſame court before us, that the ſaid *William* have his execution againſt the ſaid *Benjamin*, for the debts and damages aforeſaid, as alſo appears to us of record."

In aſſault, "for his damages, by reaſon of a certain treſpaſs and aſſault, lately committed by the ſaid *Benjamin* on the ſaid *William* as alſo for his coſts, &c."

In covenant, "for his damages which he ſuſtained, as well by reaſon of the breach of certain covenants, lately made between the ſaid *Benjamin* and the ſaid *William* as alſo for his expences and coſts, &c."

In ejectment, "for his damages which he ſuſtained by reaſon of a certain treſpaſs and ejectment, (or certain

certain treſpaſſes and ejectments) committed againſt the ſaid *William* by the ſaid *Benjamin* at in your county.

Teſtatum fieri facias *in caſe.*

George the Third, by the grace of God, of Great-Britain, France and Ireland, king, defender of the faith, and ſo forth, to the ſheriffs of London, greeting: We command you, that of the goods and chattels of *Benjamin Black*, which are in your bailiwick, you cauſe to be made fifty pounds, which *William White*, lately in our court before us at Weſtminſter recovered againſt the ſaid *Benjamin* for his damages which he ſuſtained, as well by reaſon of the not performing certain promiſes and undertakings lately made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges, by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record, and have that money before us at Weſtminſter, on to render to the ſaid *William* for his damages aforeſaid; and whereupon our ſheriff of Middleſex, at a certain day now paſt, returned to us, that the ſaid *Benjamin* had not any goods or chattels in his bailiwick, whereof he could cauſe to be levied the damages aforeſaid, or any part thereof; whereas it is teſtified in our ſame court before us, that the ſaid *Benjamin* hath ſufficient goods and chattels in your bailiwick, whereof you may cauſe to be levied the damages aforeſaid, and every part thereof; and have there then this writ. Witneſs, &c.

Stormont and *Way.*

In debt.

George the Third, &c. To the ſheriff of Middleſex, greeting, &c. (to the end of the *fi. fa.*) and whereupon our ſheriffs of London, at a certain day now paſt, returned to us, that the ſaid *Benjamin* had not any goods or chattels in their bailiwick, whereof they could cauſe to be levied the debt and damages aforeſaid, or any part thereof; whereas it is teſtified in our ſame court before us, that the ſaid *Benjamin* hath

hath ſufficient goods and chattels in your bailiwick, whereof you may cauſe to be levied the debt and damages aforeſaid, and every part thereof; and have you there then this writ. Witneſs, &c.

Stormont and *Way*.

Non ommittas *fieri facias.*

George the third, &c. To the ſheriff of Middleſex, greeting: We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you enter the ſame, and cauſe to be levied of the goods and chattels of *Benjamin Black* in your bailiwick, &c.

Fieri Facias *for the reſidue in debt.*

George, &c. greeting: Whereas we lately commanded you (to the end of the firſt *fi. fa.*) and you at that day returned to us, that by virtue of that writ to you directed, you had cauſed to be made of the goods and chattels of the ſaid *Benjamin* the ſum of twenty pounds, part of the debt and damages in the ſaid writ mentioned, which money you had ready at the day and place in the ſaid writ mentioned, as by the ſaid writ you was commanded; and that the ſaid *Benjamin* had not any other goods or chattels in your bailiwick, whereof you could cauſe to be levied the reſidue of the ſaid debt and damages, or any part thereof; therefore we command you, that you cauſe to be levied of the goods and chattels of the ſaid *Benjamin* in your bailiwick, thirty-three pounds, three ſhillings, reſidue of the ſaid ſum of fifty-three pounds and three ſhillings, which the ſaid *William* recovered againſt him in our court before us, at Weſtminſter, for his ſaid debt and damages, and that you have that money before us at Weſtminſter, on to render to the ſaid *William* for the reſidue of his ſaid debt and damages, and have you there then this writ. Witneſs, &c.

Stormont and *Way*.

Fieri

Fieri facias *to a county palatine.*

George, &c. To the reverend father in God Thomas, by divine Providence, lord biſhop of Durham, greeting: We command you, that by our writ under the ſeal of your biſhoprick, duly to be made, and to the ſheriff of the county of Durham to be directed, you command him, that of the goods and chattles of *Benjamin Black*, in his bailiwick, he cauſe to be made, as well a certain debt of one hundred pounds, which *William White*, lately in our court before us at Weſtminſter recovered againſt him, as alſo ſixty-three ſhillings, which were awarded to the ſaid *William* in our ſaid court, for his damages which he hath ſuſtained by reaſon of the detaining the ſaid debt, as for his coſts and charges by him laid out in that behalf, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and have you the ſaid monies before us at Weſtminſter, on to render to the ſaid *William* for his debt and damages aforeſaid; and whereupon our ſheriff of Middleſex, at a certain day, now paſt, returned to us that the ſaid *Benjamin* had not any goods or chattels in his bailiwick, whereof he could cauſe to be levied the debt and damages aforeſaid, or any part therefore; whereas it is teſtified in our ſame court before us, that the ſame *Benjamin* hath ſufficient goods and chattels in your county, whereof the ſheriff of your ſaid county may cauſe to be levied the debt and damages aforeſaid, and every part thereof; and have you there then this writ. Witneſs, &c.

Stormont and *Way.*

Writ to the biſhop in the nature of a levari facias, *or* fieri facias, de bonis eccleſiaſticis.

George, &c. To the right reverend father in God Thomas, by divine Providence, lord biſhop of Lincoln, greeting: We command you, that of the eccleſiaſtical goods of *Benjamin Black*, in your dioceſe, you cauſe to be levied one hundred pounds for a debt which *William White* lately in our court before us recovered againſt the ſaid *Benjamin*, and alſo ſixty-

ſixty-three ſhillings, which in our ſame court before us were adjudged to the ſaid *William* for his damages which he ſuſtained, as well by detaining his ſaid debt as for his expences and coſts laid out by him above his ſuit in this behalf, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and have you that money before us at Weſtminſter, on to render to the ſaid *William* for his debt and damages aforeſaid, and whereupon our ſheriff of Middleſex returned to us at Weſtminſter, on (the day of the return of a *fieri facias* which hath been ſued out); that the ſaid *Benjamin* had not any goods or chattels in his bailiwick, whereof he could cauſe the debt and damages aforeſaid, or any part thereof to be levied; and that the ſaid *Benjamin* is a beneficed clerk, to wit, rector of the pariſh and pariſh church of *W.* in the county of *S.* in the dioceſe of Lincoln; and have you there at the ſame time this writ. Witneſs, &c.

This writ is ſealed only, and ſent to the regiſter of the dioceſe, who will make out a ſequeſtration, the plaintiff firſt giving ſecurity by bond to the biſhop.

Fieri facias *againſt an adminiſtrater.*

George the Third, &c. To the ſheriffs of London, greeting: We command you, that of the goods and chattels which were of *John Black*, at the time of his death in the hands of *Benjamin Black*, adminiſtrator of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *John* at the time of his death, who died inteſtate, to be adminiſtred in your bailiwick, you cauſe to be levied forty pounds debt which *William White* lately, in our court before us, recovered againſt the ſaid *Benjamin*, adminiſtrator as aforeſaid, and alſo ſixteen pounds, which were adjudged to the ſaid *William* for his damages which he had ſuſtained, as well by means of detaining the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf laid out, whereof the ſaid *Benjamin* is convicted as appears to us of record; and have

have you that money before us at Weſtminſter, on to render to the ſaid *William* for his debt and damages aforeſaid; and have you there then this writ. Witneſs, &c.

If againſt an executor, "Executor of the laſt will and teſtament of, &c. deceaſed."

Fieri facias *againſt an adminiſtrator who confeſſes the debt.*

George, &c. We command you, that of the goods and chattels which were of *John Black*, at the time of his death, in the hands of *Benjamin Black*, adminiſtrator of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *John*, deceaſed, at the time of his death, who died inteſtate, to be adminiſtred in your bailiwick, you cauſe to be made fifty pounds which to *William White*, lately in our court before us at Weſtminſter, were adjudged for his damages which he had ſuſtained, as well by reaſon of the non-performance of certain promiſes and undertakings, made by the ſaid *John* in his life-time to the ſaid *William* as for his coſts and charges by him about his ſuit in that behalf expended, if he hath ſo much in his hands, and if he hath not ſo much thereof in his hands, then that you cauſe to be made ſix pounds, being the coſts and charges of the ſaid *William*, and parcel of the damages aforeſaid, of the proper goods and chattels of the ſaid *Benjamin*, adminiſtrator as aforeſaid, and that you have that money before us at Weſtminſter, on to render to the ſaid *William* for his damages aforeſaid, and have there then this writ. Witneſs, &c.

If an executor or adminiſtrator confeſſes the action he is liable to coſts, *aliter* not.

Fieri facias *for defendant's coſts.*

That you cauſe to be made fourteen pounds, ten ſhillings, of the goods and chattels of *William White*,

in your bailiwick, which were awarded to *Benjami Black*, in our court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his coſts and charges by him expended, in and about his defence in a certain action on the caſe on promiſes (or as the action is) at the ſuit of the ſaid *William*, and have you that money before us at Weſtminſter, &c.

Fieri facias *for coſts on a nonſuit.*

You cauſe to be made of the goods and chattels in your bailiwick of *William White*, fifteen pounds, which were awarded to *Benjamin Black*, in our court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his expences and coſts laid out by him in a certain action (as the action is) againſt the ſaid *Benjamin* at the ſuit of the ſaid *William*, and wherein the ſaid *William* became and was nonſuited; and have you that money, &c.

Fieri facias *for coſts as in caſe of a nonſuit.*

Becauſe he hath not further proſecuted his ſaid action againſt the ſaid *Benjamin*, and have you there, &c.

Writ of venditioni exponas.

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas we lately commanded you, that you ſhould cauſe to be levied of the goods and chattels of *Benjamin Black*, fifty pounds which *William White* lately in our court before us at Weſtminſter, recovered againſt him for a debt, and alſo ſixty-three ſhillings, which, &c. (as in the writ of *fieri facias*) and you at that day returned to us at Weſtminſter that you had levied of the goods and chattels of the ſaid *Benjamin*, to the value of the debt and damages aforeſaid, which ſaid goods and chattels remained in your hands for want of buyers; therefore we being deſirous that the ſaid *William* be ſatisfied for his ſaid debt and damages, command you that you ſell, or cauſe to be ſold, the ſaid goods and chattels, and every part thereof, for the beſt price

price that can be got for the ſame, and at leaſt for the debt and damages aforeſaid, ſo that you have that money ariſing from ſuch ſale before us at Weſtminſter, on
to render to the ſaid plaintiff for his debt and damages aforeſaid; and have there then this writ. Witneſs, &c.

This writ is ſigned and ſealed, paying ſigning 1*s.* 8*d.* ſealing 7*d.*

Of the elegit.

If the lands are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods upon the *elegit*, and the ſheriff returns *nihil* as to the land, a *ca. ſa.* may iſſue for the reſidue againſt the defendant; for the election cannot be compleat, unleſs the plaintiff has ſome benefit from the land. *Str.* 226.

Upon an *elegit* the ſheriff is to impannel a jury (but no notice thereof is given to the other ſide) who are to make inquiry of all the goods and chattels of the debtor, and to appraiſe the ſame, and alſo to inquire as to his lands and tenements; and upon ſuch inquiſition, the ſheriff is to deliver all the goods and chattels (except the beaſts of the plough) and a moiety of the lands to the party, and muſt return his writ in order to record ſuch inquſition, into that court, out of which the *elegit* iſſued. 2 *Inſt.* 396. *Co.* 7. *a. b. &c.*

When the jury have found the ſeiſin, and value of the land, the ſheriff, and not the jury, is to ſet out and deliver a moiety thereof to the plaintiff by metes and bounds. *Carth.* 453.

The ſheriff ſigns the inquiſition delivered out, and not the jury; but the jury ſign their verdict, which the ſheriff keeps in his poſſeſſion. The ſheriff does not put the plaintiff in poſſeſſion, therefore, in order to recover, he muſt bring an ejectment.

Elegit.

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas *William White*, lately in our

court before us at Weſtminſter, by bill without our writ, and by the judgment of the ſame court, recovered againſt *Benjamin Black*, one hundred pounds of debt, and alſo ſixty-three ſhillings for his damages which he ſuſtained, as well by means of the detaining the ſaid debt as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* was convicted, as appears to us of record; and becauſe the ſaid *William* came in our court before us, and choſe to have delivered to him all the goods and chattels of the ſaid *Benjamin* (except the oxen and beaſts of his plough) and likewiſe a moiety of all and ſingular the lands and tenements of the ſaid *Benjamin* in your bailiwick, to hold to him and his aſſigns (as his free tenement), according to the form of the ſtatute in that caſe made and provided, until he ſhall thereof have levied the ſaid debt and damages; therefore we command you, that without delay you cauſe to be delivered to the ſaid *William*, by reaſonable price and extent, all the goods and chattels of the ſaid *Benjamin* in your bailiwick, (except the oxen and beaſts of his plough), and likewiſe a moiety of all the lands and tenements of the ſaid *Benjamin* in your bailiwick, of which the ſaid *Benjamin* on the day of (the day judgment was ſigned), in the twenty third year of our reign on which day the ſaid judgment was given was, or at any time ſince hath been ſeized, to him the ſaid *William*, the ſaid goods and chattles as his own proper goods and chattels; and alſo to hold to him and his aſſigns a moiety of the ſaid lands and tenements, as his own free tenements, according to the form of the ſaid ſtatute, until he ſhall thereof have fully levied the ſaid debt and damages, and in what manner you ſhall have executed this our writ, make appear to us at Weſtminſter, on under your ſeal, and the ſeals of them by whoſe oath you ſhall make ſuch extent and appraiſement; and have you there then this writ. Witneſs, &c.

Stormont and *Way*.

This writ is ſigned and ſealed, paying 1*s*. 8*d*. ſigning, and 7*d*. ſealing.

In

In debt the money due to the plaintiff, with the expences of the levy, poundage, and officers fees, are levied as being taken out of the penalty.

In case the damages and costs of suit only are to be levied, the plaintiff cannot sue out a *ca. sa.* and a *fi. fa.* against the defendant at the same time, and because he had executed both a *ca. sa.* and a *fi. fa.* both were set aside as irregular. *Barnes*, 198.

Execution may be sued out immediately after judgment is signed, and before it is entered. *Law of Executions*, 43.

Judgment of Mich. 1731, signed Nov. 13, and the *fi. fa.* bore *teste* 28 Nov. following. Motion to set aside the judgment as irregular, as not being revived by *scire facias*, and the *fi. fa.* not issued within the year, the plaintiff insisted that the *fi. fa.* being issued within the fourth term from the time of signing judgment was regular, and produced an affidavit that execution had been stayed by injunction out of chancery. The court held the injunction out of the case, and that the year is to be computed from the time of signing the judgment, and set aside the *fi. fa.* Barnes, 197.

If the plaintiff dies after a *fi. fa.* is sued out, it may be executed notwithstanding his death, *Cro. Eliz.* 459. And his executor or administrator shall have the money, *Ibid.* And if the plaintiff hath made no executor or administration, is not yet committed, the money must be brought into court until, &c. *Noy* 73. *Lord Raym.* 1073.

Trespass and judgment against four in *C. B.* error in *B. R.* and one died, whereby the writ abated, and thereupon the plaintiff took out a *ca. sa.* against all four. *Per cur.* 1. The writ of error is abated. 2. If execution had been taken out against three only it had been erroneous, as not warranted by the judgment. 3. If execution had not been so long delayed by the writ of error, so that it might have bore *teste* the same term as the judgment, then the death of one had not been material, because subsequent to the

teste.

teſte. 4. The execution is wrong, and muſt be ſuperſeded, becauſe the death of the party doth not appear by matter of record to the court, and until apprized of it, they are bound by the writ of error. 5. In this caſe there was no need of a *ſci. fa.* which is only neceſſary in caſes where a new perſon is to be made better or worſe by the execution, then there muſt be a *ſci. fa.* becauſe, being a ſtranger, he muſt be made a party—But where execution is neither to charge or benefit any new party, as in this caſe where there is a ſurvivorſhip, it is not neceſſary, for there is no reaſon why death ſhould make the condition of the ſurvivors better than it was before, *Salk.* 319. *Lord Raym.* 244.

If a writ of error abates by motion, the court muſt be moved for leave to take out execution; but if it abates by reaſon of variance from the record, ſo that the record is never removed, there is no need of motion. *Salk.* 264.

After a writ of error is *nonproſſed*, the court, on motion, will give leave to take out execution, although a ſecond writ of error is brought. *Hay's Rep.* 243.

If an action is brought upon a judgment pending a writ of error, and judgment obtained in that action, the plaintiff may take out execution on the ſecond judgment, unleſs the defendant moves to ſtay proceedings pending error (which is always granted) before the ſecond judgment is obtained, *Barnes* 142. 143.

If the plaintiff brings an action upon the judgment, he cannot take out execution upon the judgment till he has diſcontinued his action. 2 *Barnes*, 169.

After execution executed the court cannot inquire into the *quantum* of the debt and coſts. 2 *Barnes*, 162.

If a *ceſſat execution* upon the judgment for a year, the plaintiff may have execution after a year and a day without a *ſci. fa.*

An executor may revive a judgment, but cannot take out execution pending a writ of error. 2 *Barnes*, 347.

A *ſcire*

A *ſcire facias* to revive a judgment, or award of execution, muſt be in that county in which judgment was recovered, or execution awarded; and an execution was ſet aſide becauſe the *ſcire facias* was in a wrong county. *Barnes*, 207.

If judgment be againſt ſeveral, execution muſt be joint. 2 *Keb.* 298. *Law of Ex.* 7. 62. 2 *Barnes* 172.

But though a *ſcire facias* againſt bail be joint, execution may be ſeveral. 1 *Lev.* 225. *Law of Ex.* 63.

In popular actions there ſhall be but one execution for king and party. *Law of Ex* 63.

If two be bound jointly and ſeverally to *A.* and *A.* ſue them jointly, he may have a *capias* againſt both, and the death or eſcape of the one ſhall not diſcharge the other. But he cannot have a *capias* againſt the one, and a different kind of execution againſt the other, for they make but one debtor when ſued jointly. But if *A.* ſue them ſeverally he may ſever them in their kinds of execution, though if once a very ſatisfaction be had of one, or againſt the ſheriff for an eſcape, the other may be relieved by an *audita querela*. Hob. 59.

If *baron* and *feme* are taking in execution, the *feme* ſhall not be diſcharged. 1 *Barnes*. 442.

But if the *feme* only is, ſhe ſhall be diſcharged. 2 *Barnes*, 261. *Pract. Reg.* 208.

But if *baron* and *feme* are taken in execution, and the *baron* eſcape, unleſs the plaintiff will retake the *baron*, the *feme* ſhall be diſcharged. 1 *Vent.* 57.

In trover, if judgment and execution againſt *baron* and *feme*, the court will not diſcharge the *feme*, unleſs there is fraud or colluſion between the plaintiff and the huſband to keep her in cuſtody. *Stra.* 1167.

In battery by defendant's wife of plaintiff's wife, the court will not diſcharge the wife who is only in execution, if it appears there is no deſign to ſcreen the huſband. *Stra.* 1237. *Wel.* 149.

But it has been ſaid, that if judgment is recovered againſt *baron* and *feme* for the contract, nay even for perſonal miſbehaviour of the *feme* during her coverture, a *capias* ſhall iſſue againſt the *baron* only. *Cro. Car.* 513

If judgment is recovered againſt *baron* and *feme* for the debt of the *feme*, *dum ſola*, a *capias* may iſſue to take both *baron* and *feme* in execution. *Moor*, 704. *Barnes*, 203.

But action brought againſt *feme dum ſola*, and ſhe marries pending the ſuit, a *capias* ſhall be awarded againſt her only, and not againſt *baron*. Cro. Jac. 333.

Action againſt *baron* and *feme*, for debt, contracted by her *dum ſola*; after judgment againſt them the bail rendered both in diſcharge of bail, and on motion ſhe was diſcharged. 3 *Wilſ.* 124.

But when judgment and execution are againſt huſband and wife, ſhe ſhall not be diſcharged, but only when in cuſtody upon *meſne proceſs*, and when huſband and wife are rendered in diſcharge of bail after judgment againſt them, they are in the ſame ſituation as if bail had been never put in, and not being charged in execution the wife muſt be diſcharged. *Ibid.*

Action by *baron* and *feme* who were nonſuited, and the *feme* alone was taken upon *cap. as* for the coſts, and ſhe was diſcharged. *Barnes*. 207.

If one of two partnors be ſued, and judgment recovered, the execution muſt be againſt him. But under a *fi. fa.* againſt him, the ſheriff muſt ſeize the joint goods, and ſell a moiety thereof undivided, and the *vendee* will be tenant in common with the other parties. *Heydon* v. *Heydon*, *Salk.* 393.

The courts will not go into a nice inquiry when the *ca. ſa.* or *fi. fa.* in the original county wasſued out, but it is ſufficient to produce the writ returned, 2 *Barnes*, 169. and it need not be filed before a *teſtatum* iſſues. 1 *Barnes*, 138.

Ca. ſa. into Wilts and then a *teſtatum* into London, but the *teſtatum* part of the writ omitted and held bad; and lord Mansfield ſaid that it appeared clearly from the *Prac. Reg.* and *Barnes*, to be neceſſary that it ſhould appear to be a *teſtatum*, for it did ſo appear there upon the record; and the court held that it ſo appearing that the writ was good without reporting it. *Eaſt.* 10 *Geo.* 3. *Allen.* v. *Allen. B. R.* 2 *Blackſt. Rep.* 694.

It

It is not neceſſary to inſert the form of a *teſtatum* in a *teſtatum* writ, ſo as it may appear from the writ itſelf to be a *teſtatum*. 2 vol. Rules and orders, B. R. and *C. B.* 79. *Prac. Reg* 210, 212. *Barnes*, 129, 132.

But there muſt be an award of a *teſtatum* upon the roll.

Judgment in *B. R.* a *fi. fa.* into London returned *nulla bona*; a *teſtatum* into Montgomeryſhire, to which the ſheriff returned, that the writ of our lord the king does not run into Wales, but at the king's ſuit, or when he is concerned. *Per Cur.* on a judgment in this court, execution may be awarded into Wales or a county palatine, *Cro. Jac.* 484. *Cro. Eliz.* 445, lands in Wales are pleadable here. *Hetley*, 18, 20, 21. 2 *Buls.* 54, 156. If the writ did not run there, yet the ſheriff being an officer of the court ſhould not queſtion it, but make a return of the execution of it: and accordingly ordered the ſheriff upon a penalty to return the writ as he would ſtand by it, ſaying, that ſheriffs in Wales ought to execute judicial writs, for the court has none to write to there; as in counties palatine, where they write to the chancellor, or chamberlain, or warden, of the Cinque ports. An *elegit* may be executed in Wales, and why not a *fi. fa.* if it could not the party would be without remedy; for he cannot bring an action there upon the judgment, and he cannot outlaw the defendant becauſe; this is upon a bill of debt againſt an executor. *Draper*, v. *Blaney*, *Trin.* 22 *Car.* 2. 1 *Lev.* 291. *Raym.* 206. *Naund.* 193. 2 *Keb.* 649. 657. 784.

Motion to have goods reſtored, levied by a *fi. fa.* out of *B. R.* in the county palatine of Cheſter, denied. *Per Cur.* Execution may well iſſue out of this court to the county palatine upon a judgment originally given here. 1 *Lev.* 256.

Seizing part of the goods in a houſe on a *fi. fa.* in the name of the whole is good. *Ld. Raym.* 723.

A ſeizure of goods by the ſheriff in execution, diveſts the defendant's property and diſcharges his perſon. *Salk.* 323.

On a *fi. fa.* the ſheriff cannot deliver the goods to the plaintiff, but may on an *elegit*. L. Raym. 346.

Seizing goods on a *fi. fa.* will not discharge a co-obligor, unless they are sold, and the plaintiff satisfied. *Ld. Raym.* 1072.

By seizing goods on a *fi. fa.* the debt is discharged and payment to the sheriff is good. *Ibid.*

If two writs of *fi. fa.* be delivered to the sheriff the same day, he must execute the former first, or an action will lie against him; unless the plaintiff, who delivered the first writ, shall refuse to take out a warrant thereon. *Ld. Raym.* 252. *Carth.* 419.

If the sheriff sells goods under a *fi. fa.* which was last delivered, the property is bound, and he cannot afterwards seize them under the former writ. *Ld. Raym.* 252. *Salk.* 320.

But the party who delivered the first *fi. fa.* has his remedy by action against the sheriff. *Ibid.*

If a warrant on a *fi. fa.* be altered after it is sealed, the execution thereon is void. *Prac. Reg.* 219. *Barnes*, 199,

There were two joint partners in trade, judgment against one, and on a *fi. fa.* against him, all the goods undivided were seized in execution. *Per Cur.* The sheriff can sell no more than a moiety, for the property of the other moiety was not affected by the judgment; nor can it be taken in execution. *Ld. Raym.* 871.

If a subject recovers a judgment, and sues out a *fi. fa.* though execution is not compleated by the sheriff, the same shall be preferred to the king's extent sued out posterior to the judgment recovered. *Upper* v. *Sumner*, 2 *Blackst. Rep.* 1251. 1294.

A subjects judgment is preferred to the king's debt, if that judgment is recovered before the king's suit is commenced, or process awarded for it. 33 *Hen.* 8. *c.* 39. *s.* 34.

Defendant became bankrupt, and after his certificate allowed, his goods were taken in execution. Defendant obtained a rule to shew cause why the *fi. fa.* should not be set aside, and restitution awarded on 5 *Geo.* 2. *Per Cur.* We are not required by the statute to proceed in a summary way as to the goods of the bankrupt; although as to his person we are if the

the defendant did not obtain his certificate in time to plead it, he may bring an *audita querela*. *Rule discharged.* Calcroft *and* Swan, Barnes, 204.

A bankrupt, executor or administrator, pleading a false plea, which is found against him after the commission issued, is liable to execution for costs, for the statutes of bankrupts do not extend to effects which they may have in *auter droit*. Howard *v.* Jennet, Exor, 1 Blackst. Rep. 400.

A *fi. fa.* may be executed after the death of the plaintiff, if tested before. *Ld. Raym.* 850. *Bunb.* 271.

A *fi. fa.* bearing teste before the defendant's death, may be executed upon the goods in the hands of the executors. *Ld. Raym.* 850. *Bunb.* 271.

Execution on a *fi. fa.* in the life of the testator gives a right to the executors. *Salk.* 12.

If the sheriff, by force of a *fi. fa.* sell a term in the premisses, and the judgment on which the *fi. fa.* issued is afterwards reversed, yet the sale shall stand, though the plaintiff in error, shall be restored to the value. For the sheriff who made the sale had lawful authority to sell; and by the sale the vendee had an absolute property in the term sold. If it were otherwise, and the sale of the term should be avoided, the vendee would loose his term, and his money too; and therefore great inconvenience would follow, that no one would buy of the sheriff's goods, and chattels in such cases; and so execution of judgments, which is the life of the law, could not be done. *Manning's case*, 8 *Co.* 96.

If a sheriff on a *fi. fa.* sells a lease or term of a house, he cannot turn the lessee out of possession, but the *vendee* must bring his ejectment. 2 *Show. Rep.* 85.

A sheriff on a *fi. fa.* cannot sell an estate for life, because it is a freehold. 3 *Co.* 13.

But it is said that since the statute 29 *Car.* 2. an estate *pur auter vie* may be sold on a *fi. fa.* Comb. 391.

The sheriff cannot take in execution goods pawned or gaged for debt, nor goods demised, or letten

for years, nor goods diſtrained, nor the goods of a ſtranger on the premiſes; for the ſheriff has power to diſpoſe of the goods of the debtor only.

If the ſheriff, upon an inquiſition upon an *elegit*, returns the defendant to have twenty acres in Dale, and twenty acres in Sale, and delivers the twenty acres in Sale for the moiety of the whole, all is void, for he ought to deliver a moiety of twenty acres in each ville; and this might be avoided in evidence in ejectment brought for the lands. 1 *Lev.* 165.

If upon an *elegit* the ſheriff deliver the moiety of a houſe without metes and bounds, the return will be ill, and quaſhed for incertainty; but it is ſaid, that if a ſheriff deliver more than a moiety upon an *elegit*, the return is not void, but voidable upon a writ of error, or *audita querela*. Carth. 453.

If, upon an *elegit*, the ſheriff delivers more than a moiety, the execution is void, becauſe he hath exceeded that authority which was circumſcribed, and the plaintiff, upon an ejectment, cannot recover under that title; and is therefore at liberty to purſue a more effectual execution. 2 *Salk.* 564.

If *A.* and *B.* recover ſeveral judgments againſt *C.* and *A.* ſues out an *elegit*, and has a moiety of *C*'s lands delivered to him, and then *B.* ſues out an *elegit*, the ſheriff can extend only a moiety of the remaining lands. *Cro. Eliz.* 482.

But if *A.* has two judgments againſt *C.* and in the ſame term takes out two *elegits*, on the one he may have a moiety of the whole lands, and, on the other, the other moiety; and is not reſtrained on the latter to a moiety of the moiety, for in judgment of the law the whole term is but one day. *Hard.* 23.

A term of years may either be extended or ſold as part of the perſonalty. 8 *Co.* 171.

A rent-charge may be extended. *Moor* 32.

Lands in ancient demeſne may be extended. *Hob.* 47.

But a rent ſeek, or copyhold lands, may not be extended, *Cro. Eliz.* 656. 369.

" No goods or chattels whatſoever, lying or being in and upon any meſſuage, lands, or tenements, which ſhall

ſhall be leaſed for life, years, at will, or otherwiſe, ſhall be liable to be taken by virtue of any execution, on any pretence thereof, unleſs the party at whoſe ſuit the execution is ſued, ſhall, before the removal of ſuch goods from off the premiſſes, by virtue of ſuch execution or extent, pay to the landlord of the ſaid premiſſes, or his bailiff, all ſuch ſum and ſums of money as are or ſhall be due for rent for the ſaid premiſſes at the time of taking ſuch goods or chattels, by virtue of ſuch execution, provided the ſaid arrears of rent do not amount to more than one year's rent; and in caſe the ſaid arrears ſhall exceed one year's rent, then the ſaid party, at whoſe ſuit ſuch execution is ſued out, paying the ſaid landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the ſheriff, or other officer, is hereby empowered and required to levy and pay to the plaintiff, as well the money ſo paid for rent as the execution-money." *Stat.* 8 *Ann. c.* 14.

There muſt be a demand made by the landlord before the removal, or an action will not lie. *Stra.* 967.

The landlord is entitled to his whole rent without a deduction of poundage. *Ibid.* 643.

A ground-landlord, when there is an execution againſt the under leſſee, is not within the act. *Ibid.* 789.

After a landlord hath had one year's rent on one execution, and there cometh auother, he ſhall not have another year's rent paid. *Ibid.* 1024.

An action lies upon this ſtatute by an executor or adminiſtrator againſt a bailiff or ſheriff, for removing the goods off the premiſes without notice, before the landlord was paid his years rent. *Ibid.* 212.

Upon a commiſſion of bankrupt, the landlord ſhall be allowed his arrears of rent to the ſame amount in preference to the other creditors, even though he hath neglected to diſtrain while the goods remained upon the premiſes, which he otherwiſe is intitled to do for his entire rent, be the *quantum* what it may. 1 *Atk.* 103.

The

The foregoing act doth not extend to the crown, *Sect.* 8.

An extent iſſued againſt *P.* tenant to *S.* 12 *February*, 1728. *S.* diſtrained for rent, 22 *April*, 1729, the extent was executed the 23*d*, and the inquiſition found the goods then in the poſſeſſion of *P.* the 30*th* of the ſame month. On motion in the exchequer, that the landlord might have the benefit of the ſtatute, notwithſtanding the extent, it was denied, *Bunb.* 269.

But in Groves and D'Acaſtro, *Bunb.* 194. the court on motion on behalf of the landlord, ordered the ſheriff to ſatisfy him one years rent, the money ſeized upon the outlawry of the defendant remaining in the ſheriff's hands.

Said, that if a *fi. fa.* is delivered, and the goods appraiſed and ſold, but the writ not returned, and an extent for the king comes out of the exchequer, ſuch extent will overreach the former ſale. *Sed Per Cur.* It is a dangerous practice. Lord *Raym.* 252.

A bill of ſale held to be a removal of goods taken by a *fi. fa.* and a year's rent muſt be paid the landlord, out of the money levied by the ſheriff. *Barnes.* 211.

Inſtead of bringing an action againſt the ſheriff when the goods are removed, after notice the landlord may move the court; "That he may have reſtitution to the amount of the goods which the ſheriff hath ſold," if leſs than a years's rent, or if more, as much as will ſatisfy for a year's rent.

Chap. XXVI.

Of the entry of interlocutory and final judgment.

Entry on the roll, of an interlocutory judgment, award of inquiry, or final judgment thereon, where declaration is of a former term.

AS yet of the term of in the twenty-ſecond year of the reign of king *George* the Third. Witneſs, *William* earl Mansfield.

London,

London, to wit. *William White* puts in his place, his attorney, againſt *Benjamin Black*, in a plea of treſpaſs on the caſe.

London, to wit. The ſaid *Benjamin Black*, in his own perſon, at the ſuit of the ſaid *William White*, in the plea aforeſaid.

London, to wit. Be it remembered, that in term laſt paſt, before our lord the king, at Weſtminſter, came *William White*, by *A. B.* his attorney, and brought into the court of our ſaid lord the king, before the king himſelf, then there his certain bill againſt *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our lord the now king, before the king himſelf, of a plea of treſpaſs on the caſe, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, London, to wit. *William White* complains of *Benjamin Black*, (here is inſerted the whole declaration verbatim,) then in a new line is added the judgment.

And now at this day (that is to ſay) on in this ſame term, until which day the ſaid *Benjamin* had leave to imparl to the ſaid bill, and then to anſwer the ſame, &c. at which day before our ſaid lord the king at Weſtminſter, came as well the ſaid *William*, by his ſaid attorney, as the ſaid *Benjamin*, in his own perſon, and the ſaid *Benjamin* defends the wrong and injury when, &c. and ſays nothing in bar, or preclufion of the ſaid action of the ſaid *William*, by which the ſaid *William* remains therein undefended againſt the ſaid *Benjamin*, for which the ſaid *William* ought to recover againſt the ſaid *Benjamin*, his damages by occaſion of the premiſes; but becauſe it is unknown to the court of our lord the king now here, what damages the ſaid *William* hath ſuſtained, by reaſon of the premiſes aforeſaid. It is therefore commanded to the ſheriffs that by the oath of twelve good and lawful men of their bailiwick, they diligently inquire what damages the ſaid *William* hath ſuſtained by the means aforeſaid, as for his coſts and charges by him ſuſtained, about

hie

his ſuit in this behalf expended; and that they ſend the inquiſition which they ſhall thereupon take to our lord the king, at Weſtminſter on under their ſeal, and the ſeals of thoſe by whoſe oath they ſhall take the ſaid inquiſition, together with the writ of our ſaid lord the king, to them thereupon directed, the ſame day is given to the ſaid *William* at the ſame place; at which day before our ſaid lord the king at Weſtminſter, came the ſaid *William* by his ſaid attorney, and the ſheriffs, to wit, ſheriffs of the ſaid city, returned a certain inquiſition taken before them at the Guildhall of the city of London, in the pariſh of St. Laurence-Jewry, in the ward of Cheap, in the ſame city, on the day of in the twenty-third year of the reign of our ſovereign lord the now king, by the oath of twelve honeſt and lawful men of their bailiwick, by which it is found that the ſaid *William* hath ſuſtained damages, by occaſion of the premiſes, over and above his coſts and charges to and for thoſe coſts and charges to therefore it is conſidered that the ſaid *William* recover againſt the ſaid *Benjamin*, his damages aforeſaid, by the ſaid inquiſition above found; and alſo for his ſaid coſts and charges by the court of our ſaid lord the king now here, adjudged of increaſe, to the ſaid *William*, by his aſſent; which damages in the whole amount to and the ſaid *Benjamin* in mercy, &c.

If the declaration be of one term, and the interlocutory judgment of another, there muſt be an imparlance entered, ſo as to continue the pleadings over from the delivery of the declaration to the ſigning of the judgment, but if the declaration and the judgment be of one term, then an imparlance is not neceſſary, and the entry will be thus.

Of the term of twenty-third, George the third. Witneſs, &c.

Middleſex, to wit. *William White* puts in his place *A. B.* his attorney, againſt *Benjamin Black*, in a plea of treſpaſs and aſſault.

Middleſex,

Middleſex, to wit. The ſaid *Benjamin Black* puts in his place *C. D.* his attorney, at the ſuit of the ſaid *William White*, in the plea aforeſaid.

Middleſex, to wit. Be it remembered that on (the firſt day of term), in this ſame term, before our lord the king, at Weſtminſter, comes *William White*, by *A. B.* his attorney, and brings into the the court of our ſaid lord the king, before the king himſelf, now here, his certain bill againſt *Benjamin Black*, being in the cuſtody of the marſhal, of the Marſhalſea, of our lord the now king, before the king himſelf, of a plea of (as the action is) and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: Middleſex, to wit, (here is entered the declaration verbatim; then on a new line is added the judgment.)

And the ſaid *Benjamin* by *C. D.* his attorney, comes and defends the force and injury, when, &c. and ſays nothing in bar or preclufion of the ſaid action of the ſaid *William*, whereby the ſaid *William* remains therein undefended againſt the ſaid *Benjamin*, for which the ſaid *William* ought to recover againſt the ſaid *Benjamin* his damages by occaſion of the premiſes, but becauſe it is unknown, &c. (award of inquiry.)

Of a cognovit.

When the defendant (to ſave coſts of the execution of a writ of inquiry) confeſſes the action, with a ſtay of the execution, the confeſſion is generally wrote in the margin of the declaration, "I confeſs this action; and that the plaintiff hath ſuſtained damage to the amount of fifty pounds, beſides his coſts and charges (to be taxed by the maſter) and it is agreed that no judgment ſhall be entered up, or execution iſſue until the day of next. And I do further agree, that no writ of error ſhall be brought, nor any bill in equity filed; and that in caſe the plaintiff ſhall enter up his judgment, he ſhall be at liberty to levy the ſaid fifty-pounds, together with all coſts, ſhe-

tiff's poundage, and all other fees. As witneſs my hand, &c."

If the confeſſion be in an action of debt, it ſhould run thus, "I hereby confeſs the debt in this cauſe, and that the plaintiff hath ſuſtained damages to the amount of 1*s.* beſides his coſts and charges, to be taxed by the maſter, and the debt is agreed to be paid as follows, &c."

If the agreement is that the judgment ſhall be entred up, it is ſigned on a double half crown ſtamp paper, as it is final; but the entries are not paid for anew, nor is there occaſion for a new roll, two and ſix-pence is paid for the ſecondary's fee, and ſix-pence for the further entry of the judgment, and the judgment paper is only as far as the end of the memorandum.

Judgment on a warrant of attorney.

When a defendant is in cuſtody and the plaintiff, in order to prevent expence, accepts a warrant of attorney to confeſs judgment on conditions, care muſt be taken that ſuch warrant of attorney be executed in the preſence of an attorney for the defendant, and expreſly named by him, who ſhould inform him of the nature and effect of ſuch warrant, and the attorney is to ſubſcribe his name as a witneſs to the due execution thereof, *R. E. Car.* 2. ſuch attorney, whether of one court or the other, is ſufficient. *Str.* 530.

The warrant of attorney is confined to judgment in the particular cauſe, whereupon the defendant is in cuſtody, and does not extend to warrants given to confeſs judgments in other actions; for, in the firſt caſe, the attorney being preſent, is to avoid all practices on the part of the plaintiff, and to ſee it is done without dureſs of impriſonment; in the other, the plaintiff has no power over the defendant. 3 *Burr.* 1793. *Raym.* 797.

If the judgment is not entered up within a year and a day after the warrant given, it cannot be done without a motion in term time, which muſt be upon an affidavit

affidavit of the debt due, or part thereof being unſatisfied, the due execution of the warrant, and the defendant's being alive. It may be done on the ſame affidavit before a judge in vacation.

If the warrant of attorney be above ten years old, the motion muſt be made in court.

If a warrant of attorney given to a *feme ſole*, and ſhe marries before judgment is entered up, application muſt be made to the court for leave to enter it up by huſband and wife, founded upon an affidavit proving their marriage. 3 *Burr.* 1471.

If a warrant of attorney be given to two, and one dies before judgment entred, leave will be given to the ſurvivor to enter it up. 1 *Wilſ.* 312.

Woodward gave a warrant of attorney to confeſs a judgment, and died within a year after in time of vacation, before the eſſoign day of the ſubſequent term, which was Eaſter term: the attorney, after his death, entered up the judgment as of the preceding term, but brought not the roll in before the eſſoign day of Eaſter term; and it was moved to have the judgment ſet aſide, the warrant of attorney being revoked by the death of the party. Holt, C. J. if the party dies in the vacation, the attorney may enter up judgment at the common law, as of the proceeding term, though it be not ſo upon the ſtatute of frauds in reſpect to purchaſers, but from the ſigning; ſo this judgment is good. 1 *Salk.* 87. 2 *Lord Raym.* 766. 2 *Str.* 882.

A judgment entered up by an attorney's clerk, who uſed the name of a regular attorney, but without his knowledge or conſent, was ſet aſide. 5 *Bur.* 2660.

The court would not ſet aſide a judgment upon an old warrant of attorney, though the defendant died the day the motion was made for leave to enter it up, *viz.* at ſeven in the morning. *Str.* 1081.

If the judgment is to be ſigned in the vacation, the affidavit is taken to a judge's chambers, who will give the order to enter up the ſame; paying 4*s.*

If it is ſigned in term, counſel muſt move for leave to enter up judgment; fee 10*s.* 6*d.* the rule is drawn up at the clerk of the rules; paying 5*s.* if the affi-

davit is made in the country 2s. is paid for filing the ſame.

Affidavit.

William White, plaintiff.

In the king's bench. and

Benjamin Black, defendant.

William White, of &c. the above-named plaintiff, and *C. D.* of &c. gentleman, ſeverally make oath, and ſay, and firſt this deponent *William White* for himſelf ſaith, that the above named defendant *Benjamin Black* being juſtly indebted unto this deponent, in the ſum of fifty pounds, for money lent and advanced unto the ſaid defendant, did, in order to ſecure unto him the ſame, execute unto this deponent, a warrant of attorney, bearing date the day of 1783, thereby authoriſing certain attornies therein-named, or any other attorney of this court, to appear for him the ſaid *Benjamin Black* as of the then laſt Michaelmas term, or any other ſubſequent term, and then and there to receive a declaration for him in an action of debt, for one hundred pounds, for money borrowed, at the ſuit of this deponent, and to confeſs the ſame action, or elſe to ſuffer a judgment by *nil dicit*, or otherwiſe to paſs againſt him in the ſame action, and to be thereupon forthwith entered up againſt him of record of this court. And this deponent further ſaith, that there is juſtly due and owing to him, this deponent, for principal money and intereſt thereon, the ſum of and that he verily believes the ſaid defendant is living, he, this deponent, having ſeen and converſed with him about ten days ſince. And this deponent *C. D.* for himſelf, ſaith, that he was preſent, and did ſee the ſaid warrant of attorney executed by the ſaid defendant, and that the name *C. D.* ſet and ſubſcribed, as the witneſs thereto, is of a proper hand-writing of this deponent.

The judgment is ſigned upon a double half crown ſtamp; firſt are entered the warrants of attorney on the roll and memorandum of the term is entered, then the judgment.

London, to wit. *William White* puts in his place *A. B.* his attorney againſt *Benjamin Black*, in a plea of debt.

London to wit. The ſaid *Benjamin Black* puts in his place *C. D.* his attorney, at the ſuit of the ſaid *William White*, in the plea aforeſaid.

London to wit. Be it remembered that on (the the firſt day of term) in this ſame term, before our lord the king, at Weſtminſter, comes *William White*, by *A. B.* his attorney, and brings into the court of our ſaid lord the king, before the king himſelf now here, his certain bill againſt *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, of our lord the now king before the king himſelf, of a plea of debt, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, London to wit. *William White* complains of *Benjamin Back*, being in cuſtody of the marſhal of the Marſhalſea, of our lord the now king, before the king himſelf, of a plea, that he render the ſaid *William* one hundred pounds, of lawful money of Great Britain, which he owes to, and unjuſtly detains from him. For that whereas the ſaid *Benjamin* on the (the date of the warrant of attorney) in the year of our lord, one thouſand, ſeven hundred and eighty-three, at London aforeſaid, to wit, in the pariſh of St. Mary-le-bow, in the ward of Cheap, borrowed of the ſaid *William* the ſaid one hundred pounds to be paid to the *William*, when he the ſaid *Benjamin* ſhould be thereto afterwards requeſted; yet the ſaid *Benjamin* although often requeſted, &c. hath not yet paid the ſaid one hundred pounds, above demanded, or any part thereof to the ſaid *William* but he to pay the ſame, or any part thereof, hath hitherto wholly refuſed, and ſtill refuſes, to the ſaid *William* his damage of ten pounds, and therefore he brings ſuit, &c.

And the ſaid *Benjamin* by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and ſays nothing in bar or preclufion of the ſaid action of the ſaid *William*, by which the ſaid *William* remains therein undefended againſt the ſaid *Benjamin*. Therefore it is conſidered, that the ſaid *William* recover againſt the ſaid *Benjamin* his ſaid debt, and alſo ſixty-three ſhillings, for his damages, which he hath ſuſtained, as well by

Judgment by *nil dicit*.

by occaſion of the detaining the ſaid debt, as for his coſts and charges, by him about his ſuit in that behalf expended, by the court of our lord the king, now here adjudged to the ſaid *William*, by his aſſent, and the ſaid *Benjamin* in mercy, &c.

If it is upon an old warrant of attorney, the maſter allows 83*s.* for coſts.

By non ſum informatus.

And the ſaid *Benjamin*, by *C. D.* his attorney, comes and defends the wrong and injury when &c. and the ſaid *William* prays that the ſaid *Benjamin* may anſwer to his ſaid declaration: whereupon the ſaid attorney of the ſaid *Benjamin*, ſays, that he is not informed by the ſaid *Benjamin* of any anſwer to be given for the ſaid *Benjamin* in the premiſes, nor doth he ſay any thing in bar, or preclusion, of the ſaid action of the ſaid *William*, by which the ſaid *William* remains therein undefended againſt the ſaid *Benjamin*. Therefore it is conſidered, &c.

Chap. XXVIII.

Of the ſcire facias *to revive judgment.*

IF an execution be not had within a year and a day after judgment, a *ſcire facias* muſt be ſued out.

The *ſcire facias* is a judicial writ, and founded upon ſome matter of record, as judgment, recognizance, or letters patent, on which it lies either to enforce the execution, or to vacate or ſet them aſide; and though it be a judicial writ or writ of execution, yet it is ſo far in the nature of an original, that the defendant may plead to it, and is, in that reſpect conſidered as an action, and it is therefore held, that a releaſe of all actions, or a releaſe of all executions is a good bar to a *ſcire facias*. Co. Lit. 290. 2 Inſt. 470. Carth. 107.

But though it hath been held that a *ſcire facias* is in the nature of an original; yet it hath been adjudged, that no writ of error lies into the exchequer chamber upon a judgment given in *B. R.* on a *ſcire facias*.

facias. The Stat. 27 *Eliz. c.* 28. mentioning only ſuit or action of debt, detinue, covenant, account, caſe, ejectment, or treſpaſs. 5 *Co.* 882. *Inſt.* 471. *Palm.* 482.

But the plaintiff, after the year and day, is not deprived bringing his action on the judgment, which by the common law was the only method of revival. *Co. Lit.* 290.

If there has been no *capias ad ſatisfaciendum fieri facias elegit*, or *habere facias poſſeſſionem* ſued out within the year and day, then, in order to revive the judgment and take out execution, a *ſcire facias* muſt be ſued out into the county where the *venue* is laid, the court ſuppoſing the defendant to reſide in the ſame county where the original action was brought.

If execution is ſtayed by injunction out of chancery for above a year, the plaintiff muſt ſue out a *ſcire facias.* 1 Stra. 301. Salk. 322.

And a *ſuperſedeas quia improvide* was awarded to an execution ſtayed by injunction out of chancery for above a year, ſued out without a previous *ſcire facias.* But the court of king's bench, in *Mitchell* v. *Cue and Ux.* were unanimouſly of opinion that the *ſci. fa.* was intended to prevent a ſurprize upon the defendant after the year and day elapſed; but where he affects the delay by bringing a writ of error, or plaintiff is ſtayed by injunction, though above a year and a day, yet execution may be taken out without a *ſcire facias.* 2 Burr. 660. *Str.* 301.

An execution had after a year, and a day, without a *ſcire facias*, is not void, but voidable only. 3 *Lev.* 404. *Salk.* 273. *pl.* 4.

If a defendant brings error, and is nonſuit thereon, or the writ be diſcontinued, although it be above a year ſince the original judgment was given, yet the plaintiff may take out execution, for though in ſuch caſes there is not any new judgment, yet the bringing the writ of error revives the firſt judgment. *Cro. Jac.* 364. *Rol. Rep.* 104. 133.

If the plaintiff delay executing a writ of inquiry until a year after the interlocutory judgment, he cannot

not do it after, without a *ſcire facias*, *Eaſt.* 13 *W* 3. *Haw* v. *Caton.*

A *ſcire facias* lies not on a judgment pending a writ of error, but the writ of error pending, is a good plea to the *ſcire facias.* L. Raym. 1295.

If a judgment is againſt two, the *ſcire facias* muſt be againſt both, for it is a judicial writ, and muſt purſue the nature of the judgment. 2 *Salk.* 598.

Where a party has a matter which he might have pleaded to a *ſcire facias* in his diſcharge, and two *nihils* are returned, and judgment againſt him, the court will relieve him on motion, without putting him to the *audita querela*, *aliter*, in caſe a *ſcire facias* be returned. *Salk.* 93.

In a *ſcire facias* on judgment, if the party has a releaſe, and omits to plead it, he ſhall not have an *audita querela.* 1 Wilſ. 98.

If a writ of execution be once ſued out and entred on the roll, it may be continued until a new one is ſued out and executed, and it will be as effectual as if new writs were iſſued every term. *Str.* 100. *Mod. Caſ.* 288.

The writ of *ſcire facias* may be ſued out of courſe at any time within ſeven years of the judgment being ſigned, but after that there muſt be a motion for leave to ſue it out at the ſide bar. And an affidavit of the debt being unpaid, the defendant living, and the judgment in full force, which affidavit ſhould ſtate the term in which the judgment was recovered, and that no execution hath iſſued thereon. After each motion, if the judgment is revived by *ſcire facias*, and the defendant dies before execution, the plaintiff may ſue out a new *ſcire facias*, without motion, for the judgment, was revived before. 2 *Salk.* 598. No ſervice of the rule is required.

If the judgment be of ten years ſtanding, and no execution taken out, a *ſcire facias* cannot be ſued but on motion in court, fee to counſel 10*s.* 6*d.*

Execution cannot be ſued out on a judgment revived by *ſcire facias* after the year and day, but it muſt be again revived.

Every

Every writ of *ſcire facias* upon which a *nihil* is to be returned, ſhall be delivered to, or left in the office of, the ſheriff ſometime before the return of ſuch writ. *R. Eaſ.* 5 *Geo.* 2.

No writ of *alias ſcire facias* ſhall iſſue until the firſt *ſci. fa.* be returnable. *Trin.* 8 *W.* 3.

Every writ of *alias ſcire facias* ſhall be delivered to or left in the office of the ſheriff four days excluſive before the return of ſuch writ. *Eaſ.* 5 *Geo.* 2.

Each *ſcire facias* by bill ſhall have ſeven days between the *teſte* and return. If there are two, there muſt be fifteen days between the *teſte* of the firſt, and return of the ſecond. *Mod. Caſ. Law and Eq.* 227, 305. *Salk.* 599.

Every writ of *alias ſcire facias* ſhall bear *teſte* the day of the return of the firſt. *Salk.* 399. 6 *Mod.* 86.

The general practice upon two *ſcire facias's*, is to leave the firſt one day before the return for a *nihil*, which is thought to be a ſufficient time within the rule, *E.* 5 *Geo.* 2.

Every writ of *ſcire facias*, of which notice ſhall be given to the defendant or defendants, ſhall be delivered to, or left in the office of the ſheriff, four days before the return of ſuch writ, excluſive of the day on which ſuch writ is returnable. *Eaſ.* 5 *Geo.* 2.

The time is ſettled for warning the defendants upon a *ſcire facias* againſt bail, which may be done on the return day, therefore of courſe the writ to revive only, may be ſo conſidered. 3 *Burr.* 1360.

There muſt be eight days between the *teſte* and return, if by bill, upon one *ſcire facias*. Str. 765.

To revive a judgment it is ſeldom that the party is warned by the ſheriff; but if he is, the *ſcire facias* muſt be left at the ſheriff's office, and a warrant or ſummons taken thereon, paying 2*s.* 4*d.* directed to an officer, who will ſerve it.

The *ſcire facias* is ſigned and ſealed, ſigning, 1*s.* 8*d.* ſealing, 7*d.*

If left for a *nihil*, it is taken to the ſheriff's office, paying 1*s.* for each defendant; upon the return day, an *alias* is to be ſued out, ſigned and ſealed as before, and left at the ſheriff's office.

Praecipe *for* ſcire facias.

Middleſex, *ſci. fa.* for *William White* againſt *Benjamin Black*, for one hundred pounds debt, and ſixty-three ſhillings damages, returnable on, &c.

A. B. attorney.

Scire facias *in debt.*

George the Third, by the grace of God of Great-Britain, France, and Ireland, king, defender of the faith, &c. to the ſheriff of Middleſex, greeting: Whereas *William White*, lately in our court before us at Weſtminſter, by bill without our writ, and by the judgment of the ſame court, recovered againſt *Benjamin Black*, one hundred pounds for a debt, and alſo ſixty-three ſhillings for his damages which he ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and now on the behalf of the ſaid *William* we have been informed, that although judgment be thereupon given, yet execution for the ſaid debt and damages ſtill remains to be made to him; whereupon the ſaid *William* hath humbly beſought us, to provide him a proper remedy in this behalf; and we, being deſirous that what is right and juſt ſhould be done on this occaſion, command you (if an *alias*, "as before we have commanded you"), that by good and lawful men of your bailiwick, you cauſe it to be made known to the ſaid *Benjamin*, that he be before us, at Weſtminſter, on

to ſhew if he has, or knows of any thing to ſay for himſelf, why the ſaid *William* ſhould not have his execution againſt him for the debt and damages aforeſaid, according to the force, form, and effect of the ſaid recovery, if it ſhall ſeem expedient to him ſo to do; and further to do and receive what our ſaid court before us ſhall then and there conſider of him in this behalf; and have you there at the ſame time the names of thoſe by whom you ſhall ſo cauſe

cauſe it to be known to him, and this writ. Witneſs, *William* earl Mansfield, at Weſtminſter, the day of in the twenty third year of our reign. *Stormont* and *Way*.

Scire facias *in caſe*.

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas *William White*, lately in our court before us at Weſtminſter, by bill without our writ, and by the judgment of the ſaid court, recovered againſt *Benjamin Black*, fifty pounds, for his damages which he had ſuſtained, as well by occaſion of the not performing certain promiſes and undertakings made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him, about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record, and now on the behalf of the ſaid *William*, we have been informed &c. (as before, omitting the word debt.)

For his damages which he had ſuſtained, as well by means of a certain treſpaſs committed by the ſaid defendant at , in your county, as for his coſts &c. In treſpaſs.

For his damages which he had ſuſtained, as well by occaſion of a certain treſpaſs and aſſault, made by the ſaid defendant on the ſaid plaintiff, at in your county. In treſpaſs and aſſault.

For his damages which he had ſuſtained, by reaſon of a certain breach of covenant made by the ſaid defendant to the ſaid plaintiff, as for his coſts, &c. In covenant.

Scire facias *againſt an adminiſtrator*.

George the Third, &c. Whereas *William White*, lately in our court before us at Weſtminſter, by bill without our writ, and by the judgment of the ſame court, recovered againſt *John Black* fifty pounds for his damages, which he had ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his coſts and charges by him laid out about his ſuit in this behalf, whereof the ſaid *John* is convicted, as appears to us of record, and now on the behalf of the ſaid *William*, we have received information in our court be-

fore us, that although judgment be thereupon given yet execution of the ſaid damages ſtill remains to be made to him; and the ſaid *John* is ſince dead inteſtate, and adminiſtration of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *John* at the time of his death, was committed and granted to *Benjamin Black*, the brother of the ſaid *John Black*, in due form of law, as we have received information from the ſaid *William*, whereupon the ſaid *William* hath beſought us, that a proper remedy, in this particular, may be provided for him; and we, being willing that what is juſt and right ſhould be done, command you, that by honeſt and lawful men of your bailiwick, you make known to the ſaid *Benjamin*, adminiſtrator as aforeſaid, that he be before us at Weſtminſter, on to ſhew if he has, or knows of any thing to ſay for himſelf, why the ſaid *William* ought not to have his execution againſt him for the damages aforeſaid, to be levied of the goods and chattles which were of the ſaid *John* at the time of his death, in his hands to be adminiſtered, according to the force, form and effect of the ſaid recovery, if it ſhall ſeem expedient for him ſo to do, and further to do and receive, &c. (as before.)

Againſt an executor.

And whereas the ſaid *John Black* is ſince dead, having firſt duly made his laſt will and teſtament, and appointed *Benjamin Black* executor thereof, as we have been informed in our ſaid court before us; whereupon the ſaid *William* hath beſought us to provide him a proper remedy, &c.

For an executor.

George the Third, &c. Whereas *John White*, lately in our court before us (as in the firſt *ſcire facias* to "appears of record") yet execution of the ſaid judgment ſtill remains to be made, and the ſaid *John* is ſince dead, as we have received information from *William White*, executor of the laſt will and teſtament of the ſaid *John*; and whereupon the ſaid *William* hath beſought us, that a proper remedy in this particular may be provided for him; and becauſe we are willing that what is right and juſt ſhould be done, we command you, that by honeſt and lawful men

men of your bailiwick, you make known unto the ſaid *Benjamin*, that he be before us at Weſtminſter, on
to ſhew if he hath, or knoweth of any thing to ſay for himſelf, why the ſaid *William White*, executor, as aforeſaid, ought not to have execution againſt him, for the damages aforeſaid, according, &c.

For an adminiſtrator

As we have received information from *William White*, adminiſtrator of all and ſingular the goods and chattels, rights and credits which were of the ſaid *John White*, deceaſed, and becauſe we are willing, &c.

If the firſt *ſcire facias* be returnable in one term, and the ſecond in another, the docquet muſt be of the term in which the firſt is returnable, and an award made only on the roll of the ſecond, as far as the return day:

When the ſheriff has returned upon the firſt *ſcire facias*, *ſcire feci*, or *nihil* upon the firſt, and the *alias*: on the return day of the *alias*, or of firſt *ſcire facias*, (if only one is ſued out, and a *ſcire feci* returned on it), a rule is to be given for judgment at the clerk of the rules, in this manner:

In the king's bench.

William White,
againſt
Benjamin Black.

Rule on *ſcire facias*.

The rule for which is paid, 1*l.* 10*d.* expires in four days, excluſive of the day it is given; and if the defendant does not appear and plead, before the rule is expired, execution may be taken out after the entry made on the roll of the *ſcire facias* and ſigned at the judgment office.

When the writs of *ſcire facias* are returned, from the ſheriff's office, then is entered on a roll as far as the names of the plaintiff and defendant, and the ſum recovered, which is taken to the clerk of the judgments, and he marks the roll and the two writs of *ſcire facias*.

The

The entry of two ſcire facias's.

Middleſex, to wit. Our lord the king hath ſent to his ſheriff of Middleſex, his writ cloſed, in theſe words, to wit. George the Third, (to the end of the firſt *ſcire facias,*) *Stormont* and *Way*. Then on a new line—At which day before our lord the king, at Weſtminſter, came the ſaid *William* in his own proper perſon, and the ſheriff, to wit,

ſheriff of the ſaid county, returned to us that the ſaid *Benjamin* had not any thing in his bailiwick, where or by which he could give him notice, as by the ſaid writ he was commanded, or was the ſaid *Benjamin* found in the ſame, therefore as before it was commanded to the ſaid ſheriff, that by honeſt and lawful men of his bailiwick, he make known to the ſaid *Benjamin* that he before us, at Weſtminſter, on next after to ſhew in form aforeſaid, if, &c. and further, &c. the ſame day is given to the ſaid *William* there, &c. at which day before our ſaid lord the king, at Weſtminſter, came the ſaid *William* in his proper perſon, and the ſheriff as before returned, that the ſaid *Benjamin* had not any thing in his bailiwick, where, or by which he could give him notice, as by the ſaid writ he was commanded, or was the ſaid *Benjamin* found in the ſame; and the ſaid *Benjamin* although ſolemnly called, came not, but made default, therefore it is conſidered that the ſaid *William* have his execution againſt the ſaid *Benjamin*, for the debt and damages aforeſaid, according to the force, form, and effect of the ſaid recovery, by the default of the ſaid *Benjamin*, &c.

The entry of one *ſcire facias* and the award of the ſecond will be the ſame, only ſtopping at the return day of the ſecond.

The entry of one *ſcire facias* where a *ſcire feci* is returned, is the ſame as before, as far as the words, "returned to us," after the end of the firſt *ſcire facias*, it then proceeds, That he has made known to the defendant, to be before the king on the day and at the place

place in the ſaid writ mentioned, as by the ſaid writ he was commanded, the ſame day is given to the plaintiff there, &c. And the ſaid *Benjamin*, although ſolemnly called, came not, but made default, therefore it is conſidered that the ſaid *William* have his execution againſt the ſaid *Benjamin* for the debt and damages aforeſaid, according to the force, form, and effect of the ſaid recovery, by the default of the ſaid *Benjamin*, &c.

If the defendant appears to the *ſcire facias*, he does it by a note in writing delivered to the plaintiff's attorney, before the end of the four days, after this rule is given.

William White,
In the king's bench. againſt
Benjamin Black.

"I appear for the defendant upon the writ of *ſcire facias* iſſued in this cauſe.

Yours, &c. *A. B.* attorney."

If a *ſcire facias* be ſued out, and no proceedings had up on it within the year and day, there muſt be a new one, for the old one is diſcontinued.

The declaration when the defendant appears to the ſcire facias.

term, twenty ſecond George the third.

Middleſex, to wit. Our lord the king ſent to his ſheriff of Middleſex, his writ cloſed in theſe words, to wit, George the third, (to the end of the entry on the roll, as far as the return of the ſheriff of the ſecond *ſcire facias*; if there are two, it then proceeds) "At which day before our ſaid lord the king, at Weſtminſter, came the ſaid *Benjamin* by *C. D.* his attorney and thereupon the ſaid *William* prays that execution may be adjudged to him, of the debt and damages aforeſaid, according to the force, form, and effect of the ſaid recovery, &c."

This declaration is to be ingroſſed on treble penny paper, charging 8*d. per* ſheet for the copy, and all the

the proceedings are to be delivered to the attorney for the plaintiff, who makes up the iſſue or paper-book; a rule to plead is to be given; and plea demanded as in other caſes.

If the *ſcire facias* is bad, it cannot be amended, but the court muſt be moved to quaſh it, which is done by counſel on motion in the firſt inſtance, fee 10*l.* 6*d.* rule 5*s.* *Str.* 401.

If final judgment be obtained againſt *B.* by *A.* who afterwards dies, his executor muſt take probate of his will, ſo as to recover the money, at Doctor's Commons, for the money is aſſets at Weſtminſter, and the executor cannot maintain the *ſcire facias* without ſuch probate. 6 *Mod.* 134.

Upon a judgment in *B. R.* the adminiſtrator brought his *ſcire facias*, and when he declared the letters of adminiſtration brought into court were granted by the Archbiſhop of *York*. *Cur.* held the adminiſtration in the province of *York*, did not extend to it. 7 *Mod.* 15. And in another caſe, the adminiſtration was granted by the archdeacon of *Dorſet*; the court held, that ſuch adminiſtration could not intitle the adminiſtrator to recover, and the adminiſtration, *quoad* the judgment, is void. 6 *Mod.* 134.

Baron and *feme* brought a *ſci. fa.* upon a judgment recovered by the *feme dum ſola*. After execution awarded, the *feme* dies, it was held, it ſurvived to the huſband. 3 *Mod.* 186. *Salk.* 116.

Judgment was recovered againſt a *feme ſole*, who after married, a *ſcire facias* was ſued out againſt the huſband and wife, and judgment againſt them; before execution executed the wife died, and after her death, a new *ſcire facias* was iſſued againſt the huſband, and he was held chargeable; but he was not liable upon the firſt judgment.

If after motion, and judgment revived by *ſcire facias*, the defendant dies before execution, the plaintiff muſt ſue out a new *ſcire facias*, but may have it without motion; for the judgment was revived before. 2 *Salk.* 598.

Judgment

Judgment in ejectment, and after a year and a day there was an *habere facias poſſeſſionem*, without bringing a *ſcire facias*, and adjudged that it ought to be brought as well againſt the tertenants as againſt the defendants, *Wilbers* v. *Harris*, 3 *Salk.* 319. *pl.* 1. *Sid.* 317. 361. In 1 *Salk.* 258. it was argued that there muſt be a *ſcire facias* for the damages, but not as to the term, but lord Holt ſays, that as to the poſſeſſion of the land, an ejectment was real, and the only remedy for a term, or for years; and therefore the *ſcire facias* is as neceſſary in this as in any real action, and ordered it to go againſt the tertenants, as well as the defendant. 2 *Salk.* 600.

Of the ſcire facias *on proceedings by original.*

If the proceedings are by original, the filazer makes out the *ſcire facias* but this may be done by the attorney, for expedition; the only difference by bill and original is, that the words "bill without," are left out, as thus: "Whereas *William White*, lately in our court before us, by our writ, and by the judgment of the ſame court, &c. the return muſt be general, wheresoever, &c." the filazer ſigns the writ and his name is put inſtead of that of the chief clerk; and there muſt be fifteen days between the *teſte* and return. The judgment is ſigned at the ſame office as by bill, but it muſt be four days after, *quarto die poſt* of the return of the ſecond *ſcire facias*, if there are two, if not, four days after *quarto die poſt* of the firſt, if returned *ſcire feci*.

"If any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the ſaid action ſhall not abate by reaſon thereof, if ſuch action might originally be proſecuted or maintained by the executors or adminiſtrators of ſuch plaintiff; and if the defendant die after ſuch interlocutory judgment, and before final judgment therein obtained, the ſaid action ſhall not abate, if ſuch action might originally be proſecuted or maintained againſt the executors or adminiſtrators of ſuch defendant

and the plaintiff, or if he be dead after ſuch interlocutory judgment, his executors or adminiſtrators ſhall and may have a *ſcire facias* againſt the defendant, if living after ſuch interlocutory judgment; or if he died after, then againſt his executors or adminiſtrators, to ſhew cauſe why damages in ſuch action ſhould not be aſſeſſed and recovered by him or them: and if ſuch defendant, his executors or adminiſtrators, ſhall appear at the return of ſuch writ, and not ſhew or alledge any matter ſufficient to arreſt the final judgment, or being returned warned, or upon two writs of *ſcire facias* it be returned, that the defendant, his executors or adminiſtrators, had nothing whereby to be ſummoned, or could not be found in the county, ſhall make default; that thereupon a writ of inquiry of damages ſhall be awarded, which being executed and returned, judgment final ſhall be given for the ſaid plaintiff, his executors or adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias* againſt ſuch defendant, his executors or adminiſtrators reſpectively." *Stat.* 8 & 9 *W.* 3. *c.* 10. *ſ.* 6.

Scire facias *by an executor after an interlocutory judgment, and before inquiry executed.*

George the Third, &c. To the ſheriff of Middleſex greeting: Whereas, heretofore, that is to ſay, in term, in the year of our reign, in our court before us, came *John White*, by *A. B.* his attorney, and brought into the ſame court then and there his bill againſt *Benjamin Black*, being in the cuſtody of the marſhal of our Marſhalſea before us, of a plea of treſpaſs on the caſe; for that whereas (to the end of the declaration). And afterwards, to wit, in that very ſame term, in the year aforeſaid, the ſaid *Benjamin*, in his own proper perſon, came into our ſaid court before us, and defended the wrong and injury, when, &c. but ſaid nothing in bar or preclusion of the ſaid action of the ſaid *John*, whereby the ſaid *John* remained therein undefended againſt the ſaid *Benjamin*, and ſuch proceedings

ceedings were thereupon had, in our ſaid court before us at Weſtminſter, that the ſaid *John* ought to recover his damages by occaſion of the premiſes; but becauſe it was unknown to our ſaid court before us what damages the ſaid *John* had ſuſtained by means of the premiſes aforeſaid, it was commanded to the then ſheriff, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the ſaid *John* had ſuſtained, as well by occaſion of the premiſes, as for his coſts and charges by him laid out about his ſuit in that behalf; and that he ſhould ſend the inquiſition; which he ſhould thereupon take, under his ſeal, and the ſeals of thoſe, by whoſe oath he ſhould take that inquiſition, on next after together with our writ to him for that purpoſe directed, as by the record and proceedings thereof, remaining in our ſaid court before us, at Weſtminſter aforeſaid, more fully and at large appears, yet inquiſition of the ſaid damages ſtill remains to be made; and the ſaid *John* after interlocutory judgment had been given in form aforeſaid, and before the return of the ſaid writ of inquiry by us to the ſaid ſheriff ſent as aforeſaid, for the purpoſe aforeſaid, died, having firſt duly made his laſt will and teſtament in writing, and appointed *William White* ſole executor thereof, upon whoſe death the ſaid *William* duly proved the ſaid will in the prerogative court of the Archbiſhop of Canterbury, in due form of law, and took upon himſelf the burthen of the execution thereof, as by the ſaid *William* we are given to underſtand and be informed, wherefore the ſaid *William*, executor as aforeſaid, (or inteſtate and adminiſtration of all and ſingular the goods, chattels, rights and credits, which were of the ſaid *John* at the time of his death, was by Thomas, by divine Providence Archbiſhop of Canterbury, primate of all England, and metropolitan, committed and granted to *William White*, to wit, at Weſtminſter aforeſaid, as by the ſaid *William* we are given to underſtand, and be informed, and the ſaid *William*, adminiſtrator as aforeſaid (hath humbly beſought us to provide him a proper remedy in this behalf, we com-

mand you that, by good and lawful men of your bailiwick, you make known to the ſaid *Benjamin*, that he be before us on next after to ſhew if any thing he has, or knows to ſay for himſelf, why the damages in the ſaid action ought not to be aſſeſſed and recovered by the ſaid *William*, executor (or adminiſtrator) as aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided, if it ſhall ſeem expedient for him ſo to do; and further, to do and receive what our ſaid court before us ſhall then and there conſider of him in this behalf, and have there then the names of them by whom you ſhall make known to him, and this writ. Witneſs, &c.

Stormont and *Way*

Declaration on ſcire facias.

London, to wit. Our lord the king ſent to his ſheriff of Middleſex his writ, cloſed in theſe words, to wit, (here are ſet forth the words of *ſcire facias* as far as the return of the ſecond exactly as on the roll, it then proceeds:) And the ſaid *Benjamin* being ſolemnly called, comes by *C. D.* his attorney, and thereupon the ſaid *William*, executor (or adminiſtrator) as aforeſaid, prays that the damages in the ſaid action be aſſeſſed, and be recovered by him the ſaid *William*, according to the form of the ſtatute in that caſe made and provided; and the ſaid *William* brings into court here the letters teſtamentary (or letters of adminiſtration) of the ſaid *John*, whereby it fully appears to the court here, that the ſaid *William* is executor, and hath the adminiſtration thereof, &c.

If the defendant does not appear after the rule is expired, the firſt *ſcire facias* is entered on the roll, which is taken to the clerk of the judgments, who ſigns it, paying him 2*s.* after which the writ of inquiry is to be executed, and final judgment ſigned.

After final judgment is obtained, the ſame is entered on the *ſcire facias* roll, therefore if carried in the

the inquiſition is taken to Weſtminſter for that purpoſe, paying 2*s.* 6*d.* the award of the inquiry, inquiſition, and final judgment is then to be added.

The entry of the judgment and inquiſition, with final judgment thereon.

As yet of the term of 23 *Geo.* 3. 1783
Witneſs *William* earl Mansfield.

Middleſex, to wit. Our lord the king ſent to his ſheriff of Middleſex his writ cloſed in theſe words, to wit: George the Third, &c. (to the end of the firſt *ſcire facias*) At which day, before our lord the king at Weſtminſter, came the ſaid *William*, executor (or adminiſtrator) as aforeſaid, in his own proper perſon, and the ſheriff, to wit,

ſheriff of the ſaid county, returns to us that the ſaid *Benjamin* had not any goods or chattels in his bailiwick, where, or by which he could give him notice, as by the ſaid writ he was commanded, or was the ſaid *Benjamin* found in the ſame; therefore, as before it was commanded to the ſaid ſheriff, that by honeſt and lawful men of his bailiwick, he made known to the ſaid *Benjamin* to be before us at Weſtminſter, on next after to ſhew in form aforeſaid, if, &c. and further, &c. the ſame day is given to the ſaid *William*, there, &c. at which day, before our ſaid lord the king at Weſtminſter, came the ſaid *William*, executor (or adminiſtrator) as aforeſaid, in his proper perſon, and the ſheriff as before returned, that, &c. (here the return is ſet forth as above); and hereupon the ſaid *William*, executor (or adminiſtrator) as aforeſaid, prays that the damages aforeſaid by the ſaid *John*, in his life-time ſuſtained on occaſion of the premiſes aforeſaid, may be aſſeſſed and recovered; therefore it is conſidered by the court of our ſaid lord the king, now here that the damages aforeſaid, by him the ſaid *John*, in his life-time ſuſtained on occaſion of the premiſes aforeſaid, be aſſeſſed and recovered by the ſaid *William*, executor (or adminiſtrator) as aforeſaid, according to the form of the ſtatute in that caſe made and

and provided by the default of the ſaid *Benjamin*, and becauſe it is ſtill unknown what damages the ſaid *John* hath ſuſtained by the occaſion of the premiſes; therefore, as before, the ſheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the ſaid *John* hath ſuſtained, as well by reaſon of the premiſes, as for his coſts and charges by him laid out about his ſuit in that behalf, and the inquiſition which he ſhall thereupon take, make appear to us at Weſtminſter, on next after under his ſeal, and the ſeals of thoſe by whoſe oath he ſhall take the ſaid inquiſition, the ſame day is given to the ſaid *William* there, &c. at which day before our lord the king at Weſtminſter, came the ſaid *William*, by *A. B.* his attorney, and the ſheriff, to wit, ſheriff of the ſaid county, returns a certain inquiſition, taken before him at (the place where the inquiſition was taken); (here is ſet forth the inquiſition;) therefore it is conſidered that the ſaid *William*, executor (or adminiſtrator) as aforeſaid, recover againſt the ſaid *Benjamin* the ſaid in form aforeſaid, found by the ſaid inquiſition, and alſo adjudged by the court of our lord the king now here, to the ſaid *William* by his aſſent, for his increaſe of the coſts and charges aforeſaid, which ſaid damages amount in the whole to and the ſaid *Benjamin* in mercy, &c.

Scire facias *againſt an adminiſtrator of defendant dying after interlocutory judgment.*

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas lately in our court heretofore (that is to ſay) in term, in the twenty-third year of our reign, in our court before us came *William White* by *A. B.* his attorney, and brought into the ſame court before us then there his bill againſt *John Black*, being in the cuſtody of the marſhal of our Marſhalſea before us, of a plea of treſpaſs on the caſe: For that whereas (to the end of the declaration) to the damage of the

the ſaid *William* of pounds, as he ſaith, and thereupon he brought ſuit, &c. and afterwards, to wit, in that very ſame term, in the twenty-third year aforeſaid, the ſaid *John* in his own proper perſon, came into our court before us, and defended the wrong and injury, when, &c. but ſaid nothing in bar or preclusion of the ſaid action of the ſaid *William*; whereby the ſaid *William* remained in our ſame court, before us undefended againſt the ſaid *John*, and ſuch proceedings were thereupon had in our ſaid court before us at Weſtminſter, that the ſaid *William* ought to recover his damages by occaſion of the not performing the ſeveral promiſes and undertakings aforeſaid: but becauſe it was unknown to our ſaid court before us, what damages the ſaid *William* had ſuſtained by occaſion of the premiſes aforeſaid; We therefore commanded you, that by the oath of twelve good and lawful men of your bailiwick, you ſhould diligently inquire what damages the ſaid *William* had ſuſtained, as well by occaſion of the not performing the ſeveral promiſes and undertakings aforeſaid, as for his coſts and charges by him about his ſuit in that behalf expended, and that you ſhould ſend the inquiſition which you ſhould thereupon take to us at Weſtminſter, on next after laſt paſt, under your ſeal, and the ſeals of thoſe by whoſe oath you ſhould take that inquiſition, together with our writ to you for that purpoſe directed, as by the record and proceedings thereupon, remaining in our court before us at Weſtminſter, manifeſtly appears; yet inquiſition of the ſaid damages ſtill remains to be made, and the ſaid *John* after interlocutory judgment had been given in form aforeſaid, and before the return of the ſaid writ of inquiry by us to you ſent, for the purpoſe aforeſaid, died Inteſtate, and adminiſtration of all and ſingular the goods, chattels, and credits which were of the ſaid *John*, have been granted to *Benjamin Black*, as we have been given to underſtand, and be informed, and becauſe we being willing that thoſe things, which in our ſaid court before us, ſhould be duly executed, we command you, that by good and lawful men of your bailiwick,

you

you make known to the said *Benjamin*, administrator as aforesaid, that he be before us at Westminster, on next after to shew if any thing he has, or knows to say for himself, why the said damages in the said action ought not to be assessed and recovered by the said *William* against him according to the form and effect of the statute in such case made and provided, if it shall seem expedient for him so to do, and further to do and receive what our said court before us, shall there and then consider, &c. (here are stated the exact proceedings from the suing out the *scire facias*, whether only one, and a *scire fact* returned on a *scire facias* and *nihil* returned, and award of another *scire facias*, and the return thereon, inserting the writs and returns.)

Chap. XXIX.

Of the scire facias *against bail.*

THE conditions on which the defendant is admitted to bail, are that if he be condemned in the action, he shall pay the plaintiff the condemnation money or surrender himself prisoner, or the bail shall pay the condemnation money for him.

If the plaintiff therefore wishes to resort to the bail, his execution must not be by *fieri facias* or *elegit*, for by these he attempts a satisfaction from the property of the defendant; but it must be by writ of *capias ad satisfaciendum* which writ must be returned by the sheriff *non est inventus*, for the bail are only liable on the failure of the principal.

Where the recognizance is forfeited by not performing the conditions thereof, the plaintiff may either bring an action of debt upon the recognizance or proceed by *scire facias*, a writ which commands the sheriff to make known to the bail the judgment recovered, the effect of the recognizance, and that the

the defendant hath not surrendered, and therefore that they appear in court, and shew cause why the plaintiff should not have execution against them for the debt and damages recovered.

The recognizance of bail is always entered as taken in court, although actually taken by a judge at chambers, nor is such recognizance a record until filed.

When a defendant, against whom judgment has been had, renders himself, or is surrendered by his bail, in their discharge, notice should be immediately given to the plaintiff's attorney, and an *exoneratur* entered upon the bail-piece; for unless such notice is given, and the bail piece discharged before the return of the *capias ad satisfaciendum*, the bail are fixed with the debt and costs in point of law.

The *ca. sa.* must be left for a return of *non est inventus* by the sheriff, in his office four days, exclusive of the return-day, the bail not being bound to render the principal, until they know what execution the plaintiff chuses to take out. 4 *Burr.* 2442.

If the action be by original, there must be fifteen days between the *teste* and return of the *ca. sa.* in order to charge the bail. *Stat.* 13 *Car.* 2. *c.* 2.

But if by bill, eight days is sufficient. *Salk.* 569. 602. *Ld. Raym.* 1177.

If the plaintiff chuses to proceed against the bail by action of debt upon the recognizance, before a writ is sued out against the bail upon the recognizance, there must be entered on a roll the declaration, and the recognizance of bail, as of the term the declaration is of; and the writ must contain a clause of *ac etiam*, "and also to a bill of the said *William* against the said *Richard* and *Bartholomew* in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited," otherwise the defendants, or their attorney, are not bound to accept a declaration in debt upon such recognizance in bail. *Rule*, *E. T.* 15 *Geo.* 2.

The bail shall have eight entire days in full term, next after the return of the writ of *latitat*, or other process sued out against them to render the principal, if not, upon notice in writing thereof given to the

plaintiff, or his attorney, all further proceedings, againſt the bail on the recognizance ſhall ceaſe. *R. Trin.* 1 *Ann.*

If there are but four days in term after the return of the writ, the defendant ſhall have four days in the next term to render. 1 *Ld. Raym.* 721.

In an action of debt on the recognizance againſt bail, the *venue* muſt be laid in Middleſex. *Salk.* 564. 6co. 659.

Formerly, if the plaintiff declared for more than the proceſs, the bail were diſcharged: but now the bail ſhall not be anſwerable for more than the ſum ſworn to, or indorſed on the writ or proceſs, on which the defendant was arreſted, together with coſts of ſuit. *Rule, E.* 5 *Geo.* 2.

On proceeding againſt the bail by *ſcire facias* the bail-piece muſt be had from the judges chambers, or if the bail be juſtified in court, from the maſter's clerk, paying him 1*s.* and then filed, the plaintiff muſt only proceed againſt thoſe that juſtified, if there are more on the bail-piece, as they who did not juſtify may get leave to be exonerated, *nunc pro tunc.* 4 *Burr.* 2107.

There is entered upon the roll the declaration and the recognizance of bail, with a memorandum of the term the declaration is of, which is to be docquetted and filed in the treaſury-chamber; a number-roll muſt therefore be had of the term the declaration is of.

Docquet paper.

Entries of *A. B.* gentleman, one, &c. of the term of twenty-third George the Third, one thouſand, ſeven hundred and eighty-three.

Middleſex. Entry of a recognizance of bail between *William White* plaintiff, againſt *Richard Red* and *Bartholomew Brown*, bail of *Benjamin Black*.

Roll.

But if any rolls of that term, are already carried in, then the docquet muſt be, "the further entry of, &c. this roll is taken to the clerk of the judgments,

ments, who will enter the recognizance, paying 2s. and mark the roll, for which is paid 1l. more, if a further entry; if not 3s. for the docquet, and it is then to be filed in the treasury at Westminster.

The carrying in the roll is now dispensed with, but not the entry; and it seems if it is filed any time before replication, it is sufficient, if the bail plead *nul tiel record*; nor is there any occasion to file the *ca. sa.* till replication. 3 *Burr.* 1360.

Entry of recognizance of bail.

As yet of the term of twenty-third of George the Third. Witness *William* earl Mansfield.

Middlesex, to wit. Be it remembered, that on in this same term, before our lord the king at Westminster, comes *William White* by *A. B.* his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against *Benjamin Black*, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, (here is entered the whole declaration *verbatim*, &c. it then proceeds,) and the said *Benjamin Black*, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and hereupon *Richard Red*, of, &c. and *Bartholomew Brown*, of, &c. (naming the bail and additions as in the bail-piece), came into the court of our said lord the king, before the king himself, at Westminster, in their own proper persons, and became pledge and bail for the said *Benjamin*, and each of them became pledge and bail for the said *Benjamin*; that if it shall happen that the said *Benjamin* shall be convicted, at the suit of the said *William*, in the plea aforesaid, then the said bail consented, and each of them consented, that all such damages which shall be judged to the said *William* in that behalf, shall be made of their and each of their lands and chattels,

and levied to the uſe of the ſaid *William*, if it ſhall happen that the ſaid *Benjamin* ſhall not pay the ſaid damages, or render himſelf to the marſhal of the priſon of the Marſhalſea of our lord the king, before the king himſelf on that occaſion.

As ſoon as the entry of the recognizance is made and entered, and the *capias ad ſatisfaciendum* returned by the ſheriff, a *ſcire facias* muſt be ſued out againſt the bail (which muſt be iſſued in Middleſex), which is ſigned and ſealed, ſigning 1s. 6*d.* ſealing 7*d.*

It is to be teſted on the return day of the *ca. ſa.* if by bill; if by original, on the *quarto die poſt* of the return-day; and left at the ſheriff's office for the return of *nihil*, for which is paid 1s. if the plaintiff doth not ſummon the bail. On the return-day, an *alias* muſt be ſued out, and ſigned and ſealed as before, and left at the ſheriff's for return four days, excluſive of the return-day. *R. E.* 5 *Geo.* 2. the *alias* muſt bear *teſte* the return-day of the firſt *ſcire facias*.

But if only one *ſcire facias* is ſued out, which is to be returned *ſcire feci*, then a ſummons is to be got from the ſheriff, directed to one of his officers, who will ſummon the bail thereon, and the ſummons is good although not left till the day of the return; but this *ſcire facias* is to lie in the ſheriff's office four days, excluſive of the return-day. *R. E.* 5 *Geo.* 2. ſummons 2s. 4*d.* each defendant, officer 5s. each.

Scire facias *againſt bail*

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas *William White*, lately in our court before us at Weſtminſter, by bill without our writ, and by the judgment of the ſame court, recovered againſt *Benjamin Black*, for his damages which he ſuſtained, as well by reaſon of the not performing certain promiſes and undertakings made by the ſaid *Benjamin*, to the ſaid *William*, (if the action be in debt, as well a certain debt of one hundred pounds, as alſo twenty pounds for his damages which he had ſuſtained, as well by means of the detaining the ſaid debt) as for his coſts and charges by him about

about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and although judgment thereof be thereupon given, yet execution of the damages aforeſaid ſtill remains to be made to him the ſaid *William*; and whereas *Richard Red*, of, &c. and *Bartholomew Brown*, of, &c. lately, (that is to ſay), in
term, in the twenty-third year of our reign, in our ſaid court before us at Weſtminſter came perſonally in their own proper perſons, and became pledges and bail, and each of them became pledge and bail for the ſaid *Benjamin*, that if it ſhould happen the ſaid *Benjamin*, ſhould be convicted at the ſuit of the ſaid *William*, in the plea aforeſaid, then the ſaid *Richard Red* and *Bartholemew Brown* conſented, and each of them conſented, that all ſuch damages (in debt, as well the ſaid debt as all ſuch damages), which ſhould be adjudged to the ſaid *William* ſhould be made of their and each of their lands and chattels, and levied to the uſe of the ſaid *William*, if it ſhould happen that the ſaid *Benjamin* ſhould not pay the ſaid damages, or render himſelf to the marſhal of our priſon of the Marſhalſea, before us on that occaſion, as by the record of the ſaid recognizance now remaining in our ſaid court before us at Weſtminſter, fully appears, yet the ſaid *Benjamin* hath not yet paid the ſaid damages (or debt and damages), or any part thereof to the ſaid *William*, or rendered himſelf to the marſhal of our priſon of the Marſhalſea before us on that occaſion, as we have received information from the ſaid *William*, wherefore the ſaid *William* hath humbly beſought us to provide him a proper remedy in this particular, and we being willing that what is right and juſt ſhould be done, commanded you (if an *alias* "as before we have command you,") that by honeſt and lawful men of your bailiwick, you cauſe it to be known to the ſaid *Richard Red* and *Bartholomew Brown*, that they be before us on
to ſhew if they have or know, or if either of them hath or knoweth, of any thing to ſay for themſelves, or himſelf, why the ſaid *William* ought not to have his execution againſt the ſaid *Richard Red*

Red and *Bartholomew Brown* for the damages (or, debt and damages) aforesaid, according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do, and further to do and receive all and singular those things which our said court before us shall then and there consider of them in this behalf, and have there then the names of those by whom you shall cause it to be made known to them, and this writ. Witness *William* earl Mansfield, at Westminster, the day of in the twenty-third year of our reign

Storment and *Way*.

Præcipe.

Middlesex. *Sci. fa* for *William White*, against *Richard Red* and *Bartholemew Brown*, bail for *Benjamin Black*, for damages, returnable on

A. B. attorney.

Rule for judgment.

White,
against
Red, and another bail of *Black*.

Rule on *sci. fa.*

On the return day of the first *scire facias*, if it is returned *scire feci*, or on the return day of the *alias*, if returned *nihil*, a rule must be given for judgment, at the clerk of the rules, paying 1*s.* 10*d.* if no appearance, the first *scire facias* must be entered on the roll, and taken to the clerk of the judgments, who will make the entry, which is signing the judgment, an execution may then be sued out. *Str.* 1139. 1 *Lev.* 225.

Entry of two scire facias's, *and* nihils *thereon.*

As yet of the term of twenty-third of George the Third. Witness *William* earl Mansfield.

Middlesex

Middlesex to wit. Our lord the king sent to his sheriff of Middlesex his writ, closed in these words, to wit. George the Third, &c. (to the end of the first *scire facias,*) at which day, before our lord the king at Westminster, came the said *William White*, in his proper person, and the sheriff, to wit,

sheriff of the said county, returned to us, that the said *Richard Red* and *Bartholemew Brown*, had not, or had either of them, any thing in his bailiwick, where or by which he could give them, or either of them, notice, as by the said writ he was commanded, nor were they, or either of them, in the same: Therefore, as before, it is commanded to the said sheriff, that by good, &c. he make known to the said *Richard Red* and *Bartholomew Brown*, that they be before the lord the king, at Westminster, on (the return of the *alias*) to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said *William*, there, &c. at which day before our said lord the king, at Westminster, came the said *William* in his proper person, and the sheriff as before returned, that the said *Richard Red* and *Bartholomew Brown*, had not, or had either of them, any thing in their bailiwick, where or by which he could give them, or either of them notice, as by the said writ he was commanded, nor were they, or either of them, found in the same. And the said *Richard Red* and *Bartholomew Brown*, although on that day solemnly required, came not, nor did either of them come, but made default, it is therefore considered that the said *William White* have his execution against the said *Richard Red*, and *Bartholomew Brown*, of the damages aforesaid, according to the force, form, and effect of the recognizance aforesaid, &c

If there be only one *scire facias*, and it is returned *scire feci*, at the end of the sheriff's return of *scire feci* is added, "and the said *Richard Red* and *Bartholomew Brown*, although on that day solemnly required, did not, nor did either of them come. It is therefore considered that the said *William White* have his

his execution againſt the ſaid *Richard Red* and *Bartholomew Brown*, of the damages (or debt and damages) aforeſaid, according to the force, form, and effect of the ſaid recognizance, &c."

If the two writs of *ſcire facias* are of different terms, the firſt of that term in which it is returnable is entered on the roll, and the ſecond only awarded.

If the bail appear, which is frequently the caſe, to get a term of the plaintiff, it is done by a note in writing, and there are no coſts to be paid by them, unleſs they plead. 8 & 9 *W.* 3. *c.* 10. *ſect.* 3.

If the declaration is not delivered four days excluſive, before the end of the term, they will be intitled to an imparlance.

Declaration againſt bail in ſcire facias.

Trinity term, in the twenty-third year of the reign of king George the Third.

Stormont and *Way*.

Middleſex, to wit. Our lord the king ſent to his ſheriff of Middleſex, his writ cloſed in theſe words, to wit, George the Third, &c. (here are inſerted the exact proceedings from the ſuing out the *ſcire facias*, whether only one and a *ſcire feci* returned, or a *ſcire facias* and *nihil* returned, and award of another *ſcire facias*, and the return thereon, inſerting the writs and returns:) at which day before our lord the king at Weſtminſter, came as well the ſaid *William White*, in his proper perſon, as the ſaid *Richard Red* and *Bartholomew Brown*, by *E. F.* their attorney, upon which the ſaid *William* prays that execution may be adjudged to him, of the damages aforeſaid, according to the force, form, and effect of the ſaid recognizance, &c,

The declaration may be entitled as of the term generally, although the *ſcire facias* was returnable the laſt return of the term. 3 *Wilſ.* 154.

The bail may plead, that no *capias ad ſatisfaciendum* ever iſſued againſt the defendant; that he died before the return of the *ca. ſa.* Roll. Abr. 336. that the

the plaintiff had other execution against him; that the defendant paid the money recovered, or the bail may plead a render of the principal; but they cannot plead that the principal died before the return of the *scire facias*, because if he died on the day of the return of the *capias ad satisfaciendum* the bail are liable. *Stat.* 4 & 5 *Ann. c.* 16. *s.* 12. 2 *Mod.* 312. *Leach.* 149. *Roll. Rep.* 897. *Lord Raym.* 156.

If the action were by original, the *capias ad satisfaciendum* must be returnable on a general return-day, *ubicunque*, and must have fifteen days between the *teste* and return; and when on original, the filazer enters the recognizance, and docquets the roll; therefore after the *capias ad satisfaciendum* is returned *non est inventus* against the principal, it is to be taken to the filazer for a *scire facias*, who makes it out; paying him signing 5*s.* 4*d.* and 7*d.* sealing; the *scire facias* is then to be left with the sheriff, and upon the return, the filazer will make out an *alias*. These must be fifteen days between the *teste* and return of each *scire facias*.

After the return of the second *scire facias*, *nihil*, or of one *scire facias*, *scire feci*, a rule is to be taken for judgment on the *quarto die post* of the return day, which expires in four days after that day; when judgment may (if no appearance delivered) be signed upon the roll, as by bill.

By original the bail have till the *quarto die post* of the return of the *scire facias* to surrender the principal, but it must be *sedente curia*, and not at a judge's chambers. *Lord Ray.* 156, 7. 4 *Burr.* 2134.

If the bail appear to the *scire facias*, it is done by a note in writing delivered to the attorney, for the plaintiff, as by bill.

The condition of a recognizance by original, differs from that by bill, as the former is in a penalty, and the latter generally to render; therefore it became a question, whether the levying against bail the costs of the *sci. fa.* out of the penalty, was legal, and it was held, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be levied against the bail,

and so the overplus money was restored to them. *Str.* 826.

If there be error brought by the principal, which is afterwards *non prossed*, with costs, yet the bail in the original action are not liable to the costs in error, but only the damages recovered in the original action, because they only became bound in that action.

Capias ad satisfaciendum *against bail in case.*

George the Third, &c. To the sheriff of Middlesex, greeting: We command you, that you take *Richard Red*, and *Bartholomew Brown*, the bail of *Benjamin Black*, if they be found in your bailiwick, and safely keep them, so that you may have their bodies before us at Westminster, on

to satisfy *William White* one hundred pounds, which the said *William*, lately in our court before us, recovered against the said *Benjamin*, for his damages which he had sustained, as well by means of the not performing certain promises and undertakings, lately made by the said *Benjamin* to the said *William*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Benjamin* is convicted, as appears to us of record. And whereupon it was considered, in our same court before us, that the said *William* have his execution against the said *Richard* and *Bartholomew*, for the said damages, costs and charges, according to the force, form, and effect of a certain recognizance acknowledged by them, the said *Richard* and *Bartholomew*, in our said court before us, for the said *Benjamin*, at the suit of the said *William*, as likewise appears to us of record; And have you then there this writ. Witness, &c.

Stormont and *Wop*

Testatum capias ad satisfaciendum *against bail in case*

After "appears to us of record," proceed "and our sheriff of at a certain day, now past, return

returned to us, that the ſaid *Richard* and *Bartholomew* were not, nor was either of them, found in his bailiwick, whereupon, on the behalf of the ſaid *William*, it is ſufficiently teſtified in our ſaid court before us, that the ſaid *Richard* and *Bartholomew* lurk and ſecrete themſelves in your county; and have there then this writ. Witneſs, &c.

Fieri facias *againſt bail in caſe.*

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you that of the goods and chattels of *Richard Red* and *Bartholomew Brown*, the bail of *Benjamin Black*, you cauſe to be made one hundred pounds, which *William White*, lately in our court before us at Weſtminſter, recovered againſt the ſaid *Benjamin*, for his damages, as well by means of the not performing certain promiſes and undertakings, lately made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him, about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record. And whereupon it was conſidered, in our ſame court before us, that the ſaid *William* have his execution againſt the ſaid *Richard* and *Bartholomew*, for the ſaid damages, coſts and charges, according to the force, form and effect of a certain recognizance acknowledged by them, the ſaid *Richard* and *Bartholomew*, in our ſaid court before us, for the ſaid *Benjamin*, at the ſuit of the ſaid *William*, as likewiſe appears to us of record; and have you that money before us at Weſtminſter, on to render to the ſaid *William*, for his damages aforeſaid; and have you there then this writ. Witneſs, &c.

Stormont and *Way*,

Teſtatum fieri facias *againſt bail in caſe*

After "as appears to us of record," proceed, "and our ſheriff of at a certain day now paſt, returned to us that the ſaid *Richard* and *Bartholomew* had not, nor had either of them, any goods

or chattels in his bailiwick, whereof he could cauſe to be levied the damages aforeſaid, or any part thereof, whereupon it is teſtified in our ſaid court before us, that the ſaid *Richard* and *Bartholomew* have ſufficient goods and chattels in your bailiwick, whereof you may cauſe to be levied the debt and damages aforeſaid, and every part thereof," and have there then this writ. Witneſs, &c.

Capias ad ſatisfaciendum *againſt bail in debt.*

George the third, &c. To the ſheriff of Middleſex, greeting: We command you, that you take *Richard Red* and *Bartholomew Brown*, the bail of *Benjamin Black*, if they be found in your bailiwick, and ſafely keep them, ſo that you have their bodies before us at Weſtminſter, on

to ſatisfy *William White* one hundred pounds for a debt, which the ſaid *William* lately in our court before us recovered againſt the ſaid *Benjamin*, as alſo fifteen pounds which were awarded to the ſaid *William*, in our ſaid court before us, for his damages, which he ſuſtained as well by reaſon of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *William* is convicted, as appears to us of record. And whereupon it is adjudged in our ſame court before us, that the ſaid *William* have his execution againſt the ſaid *Richard* and *Bartholomew*, for the ſaid debt and damages, according to the force, form, and effect of a certain recognizance, acknowledged by them the ſaid *Richard* and *Bartholomew*, in our ſaid court before us, for the ſaid *Benjamin*, at the ſuit of the ſaid *William*, as likewiſe appears to us of record; And have you then there this writ. Witneſs, &c.

Stormont and *Way*.

Fieri facias *againſt bail in debt.*

George the third, &c. To the ſheriff of Middleſex, greeting: We command you, that of the goods

goods and chattels of *Richard Red* and *Bartholomew Brown*, the bail of *Benjamin Black*, you cause to be made a certain debt of one hundred pounds, which *William White* lately in our court before us at Westminster recovered, against the said *Benjamin*, and also fifteen pounds which were awarded to the said *William* in our same court before us for his damages which he sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Benjamin* is convicted, as appears to us of record. And whereupon it is adjudged in our same court before us, that the said *William* have his execution, against the said *Richard* and *Bartholomew*, for the said debt and damages, according to the force, form, and effect of a certain recognizance, acknowledged by them the said *Richard* and *Bartholomew*, in our said court before us, for the said *Benjamin*, at the suit of the said *William*, as likewise appears to us of record. And have you that money before us at Westminster on to render to the said *William* for his debt and damages aforesaid, and have then there this writ. Witness, &c.

Stormont and *Way*.

The bail to acquit themselves of their recognizance intirely, and to run no hazard of the death of the defendant, must render him in their discharge, before the return of the *capias ad satisfaciendum*, as the death of the principal afterwards will not discharge them.

If the bail do not surrender the defendant before the return of the *capias ad satisfaciendum*, they still have, (unless prevented by his death) until the return day *sedente curia*, of the first *scire facias*, if returned *scire feci*, or if a *nihil* is returned thereon, then until the return day *sedente curia* of the second *scire facias*. 4 Burr. 2134.

The rule of *Easter*, 5 *Geo.* 2. directing the above surrender, will be construed strictly, and therefore the bail must not wait to the last moment, before they surrender

ſurrender the principal, for although notice may be left by the ſheriff upon the return day of the firſt *ſcire facias*, and they afterwards make all the expedition they can to take defendant, yet if they do not ſurrender him *ſedente curia*, they will be fixed, and the court, even upon affidavit, will not relieve them, though they put the defendant in the hands of the tipſtaff the evening of the return of the *ſcire facias*. 3 Burr. 1360.

If the defendant be in the cuſtody of any ſheriff (other than London or Middleſex), the rule formerly was, that an *habeas corpus* might be moved for, and made returnable in court; but now this rule is diſuſed, and the bail may have a *habeas corpus* either in term or vacation, directed to any ſheriff or goaler in whoſe cuſtody the defendant is, to bring him before a judge returnable immediately, in order to render him in diſcharge of his bail. 3 *Burr.* 1876.

If the defendant becomes bankrupt, and obtains his certificate pending the action, and before the bail are fixed, he may if in cuſtody, upon application; by ſummons, be diſcharged or the bail may, if he is not rendered, apply to have an *exoneratur* entered on the bail-piece by ſummons, which will be ordered upon producing the certificate. 1 *Burr.* 244.

If the defendant is convicted of felony, and pardoned on condition of tranſportation, and a civil action is depending againſt him, the court will grant an *habeas corpus* upon application, in order that he may be ſurrendered; and in that caſe they will commit him to the marſhal, and order an *exoneratur* to be entered, and then remand defendant to the goal from whence he came. *Str.* 641, 1217. 1 *Burr.* 339, 340.

Of ſurrendering the defendant in town.

If the defendant is in town, he is to be taken to a judge's chambers, and the clerk will make out the committment

commitment and ſurrender, for which is paid 9*s.* 6*d.* if one cauſe, tipſtaff 10*s.* 6*d.* and 3*s.* 6*d.* for the certificate of the ſurrender. As ſoon as the defendant is ſummoned, notice is to be given to the plaintiff's attorney and affidavit of the ſervice thereof ſhall be made before the bail are diſcharged, otherwiſe ſuch render is to be void. *B. Trin. 1 Ann.* but it hath been held, that though notice is not given of the render, yet if plaintiff proceeds further againſt the bail, that ſhall not vitiate the ſurrender; but the bail ſhall not be delivered till they pay the coſts. 6 *Mod.* 238.

When notice has been given to the plaintiff's attorney, of the defendant being ſurrendered, the bail-piece muſt be taken off the file, either at the judge's chambers, or with the maſter's clerks; and then taken with the certificate of the clerk of the papers, the affidavit and notice, to the maſter, who will enter an *exoneratur* thereon: paying him 2*s.* 4*d.* the bail-piece is to be then filed paying 4*d.* as ſoon as the bail are exonerated, the *committitur* and ſurrender muſt be entered in the marſhall's book at the clerk of the judgment's office in the king's bench.

William White, plaintiff,
In the king's bench. againſt
Benjamin Black, defendant.

Notice of ſurrender.

Take notice, that the above defendant did this day ſurrender himſelf in diſcharge of his bail, and was thereupon committed by the honourable Mr. Juſtice , to the cuſtody of the Marſhal, &c. there to remain until, &c. dated the day of 1783.

Yours, &c.
E. F. attorney for the bail.

To Mr. *A. B.* attorney for plaintiff.

Affidavit

Affidavit of service.

William White, plaintiff,
In the king's bench. against
Benjamin Black, defendant.

G. H. clerk to *G. F.* of, &c. gentleman, maketh oath and saith, that he did serve Mr. *A. B.* the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk or servant of the said Mr. *A. B.* at his chambers in the Inner Temple.

The form of the entry of the *committitur* and *surrender* will be seen in the marshall book.

The bail may take the principal on a Sunday, and keep him till the next day, and then surrender him, 6 *Mod.* 231. but they must stay with him, or take a note from him, consenting to remain in custody till he hath surrendered.

The plaintiff recovered judgment against the principal and took out a *capias ad satisfaciendum* and had a *non est inventus* returned: on this judgment error was brought, and two days after the plaintiff sued out a *scire facias* against the bail, who moved to stay the proceedings upon the *scire facias*, as is done in cases where pending error the plaintiff brings an action of debt upon the judgment; insisting it was more reasonable in this case, because otherwise the might lose the advantage of discharging themselves by a surrender of the principal, which they can do at any time before the return of the second *scire facias*. *Cur.* thought it reasonable that the proceedings should be staid, on the bails consenting, that if the judgment be affirmed, they would render the principal, or give judgment on the *scire facias*. Str. 419. 1 Burr. 340.

Where error is brought by the principal within the time allowed by the court for the surrender of defendant by his bail, the court will upon application stay the proceedings against them, until the writ of error shall be determined, they undertaking to

to pay the plaintiff the damages recovered, or surrender him within four days next after the determination or affirmance, if it is in favour of the defendant in error. *Capron* v. *Archer*, 1 *Burr.* 340.

If a writ of error is allowed before any proceedings against the bail, it is a *ſuperſedeas* from the time of notice of ſuch allowance; and a *capias ad ſatisfaciendum* cannot be returned againſt the principal, although taken out and left with the ſheriff the day before the allowance ſerved, and the plaintiff muſt wait until after the affirmance before a *ſcire facias* is left, *Str.* 1186. and it is a contempt to proceed againſt the bail if the allowance is ſerved in time. 1 *Burr.* 340.

A writ of error is ſo abſolutely a *ſuperſedeas*, that the plaintiff cannot ſo much as take out a *capias ad ſatisfaciendum* and return *non eſt inventus*, in order to proceed againſt the bail. *Str.* 867.

But if a writ of error is brought by the principal, and no bail is put in, ſo as to make it an abſolute *ſuperſedeas*, the court will not ſtay the proceedings againſt the bail. *Str.* 781.

If the principal do not bring his error in time, and the plaintiff proceed againſt the bail, and the ſecond *ſcire facias* is returnable, the court will not then let them into the terms of a render, but oblige them to pay the condemnation-money, and the coſts of the *ſcire facias*, in four days after affirmance; and where there is no bail required in error, they will alſo make them pay the coſts in error, if the judgment is affirmed. *Str.* 877.

Where the bail do not apply to ſtay the proceedings pending error, till their time to ſurrender is out, the court will not give them any time for that purpoſe, but only four days to pay the money in after the judgment is affirmed. *Str.* 1270.

If the bail undertake to pay the debt and coſts within four days after affirmance in the exchequer-chamber, and the judgment is affirmed, and the defendant brings error in parliament, the plaintiff ſhall not have execution, until the affirmance there, becauſe that is the final affirmance. 5 *Burr.* 2820.

The plaintiff obtained judgment, and defendant brought a writ of error, and tranſcribed, which remains undetermined, defendant was ſerved with a writ on the judgment, and for want of plea, judgment againſt him by default, and execution iſſued, and the ſheriff in poſſeſſion. The court ſtayed the proceedings upon it, as it would be unreaſonable, that the plaintiff ſhould proceed in executing a judgment, which would of courſe fall to the ground in caſe the original judgment ſhould be reverſed, but defendant was bound not to bring a bill in equity. 4 *Burr.* 2454.

A *ſcire facias* was brought againſt three bailees on a recognizance acknowledged by them and the principal, jointly; and on demurrer thereto the writ abated, becauſe being founded on a record the plaintiff ſhould ſhew the cauſe of variance from the record, as that one was dead. But if an action is brought upon a joint bond againſt three, only where there are four or five obligors, there the defendants ought to ſhew that it was made by them and others in full life, not named in the writ; becauſe the court ſhall not intend that the bond was ſealed and delivered by all that were named in it; and therefore the defendants cannot demur upon it though it be entered in *hæc verba*. Allen 21.

A *ſcire facias* does not lie againſt bail, unleſs a *capias ad ſatisfaciendum* is ſued out, returned, and filed; but it may be filed after the *ſcire facias* iſſues. 1 *Lev.* 225. *Note on Rule, Eaſt.* 5 *Geo.* 2.

A *ſcire facias* iſſued againſt the bail teſted 23 June returnable the 30th; it was left in the ſheriff's office the 25th, and the ſame day a warrant iſſued; but it was not ſerved on one of the bail until the 29th, and not on the other until the 30th in the morning, being the laſt day of term. No *capias ad ſatisfaciendum* was returned and filed until the 31ſt. The bail on the laſt day of the term, June 30, before the riſing of the court, ſurrendered their principal, and afterwards moved, that an *exoneratur* might be entered upon the bail-piece, and proceedings ſtayed againſt them. But the court diſcharged the rule with coſts, holding the return and filing of the *capias ad ſatisfaciendum*

to

to be mere matter of form if it is properly teſted and made returnable, and lie in the ſheriff's office the uſual time; and is afterwards returned *non eſt inventus*. And they held the ſhortneſs of the notice to the bail immaterial. 1 *Blackſt.* 393.

Motion to ſtay proceedings on a *ſcire facias* againſt bail, they not being ſerved with a copy of the ſheriff's warrant which recites the writ *verbatim*. But the one by giving him a perſonal ſummons and reading to him the ſheriff's warrant; the other by leaving a memorandum containing the ſubſtance of the writ with his wife at his houſe in his abſence. It appeared on inquiry of the officers, that it is uſual in Middleſex to ſerve the bail with a copy of the ſheriff's warrant; but not ſo in many other counties; and has aroſe in Lincolnſhire. In ſome counties they give verbal notice; in ſome none at all. The court thought ſome notice ſhould be given, *Salk.* 599. the ſufficiency of which, if diſputed, muſt be determined by the court upon the circumſtances; and that this notice was ſufficient, therefore diſcharged the rule. *Wright* v. *Page*, *Tr.* 12 *Geo.* 3. *C. B.* 2 *Blackſt. Rep.* 837.

On a recognizance taken in *B. R.* the *ſcire facias* muſt be brought in Middleſex, 3 *Danver's Abridg.* 313. for the recognizances in *B. R.* are not obligatory by the caption, but by their being entered of record in the court. *Salk.* 600. 659. *Hob.* 195. *Brownl.* 69. *S. C. Moor* 833. *S. C. Styles* 9.

But if bail be taken by a commiſſioner in the country, the *ſcire facias* may either be ſued out into Middleſex where the recognizance is entered of record, or the county where taken. *Lutw.* 1287.

A *ſcire facias* againſt bail is not amendable. *Grey* v. *Jefferſon*, *Strange* 1165.

But a *ſcire facias* may be quaſhed on motion without coſts before plea pleaded, although the defendant has entered an appearance. *Barnes* 431.

The *capias ad ſatisfaciendum* againſt the principal being left in the ſheriff's office, gives notice to the bail that the plaintiff will proceed againſt the perſon; and it is therefore incumbent on the bail to ſearch

whether any *capias ad ſatisfaciendum* be left in the office. *Burr. Rep.* 4 *pt.* 1360.

Two *ſcire facias's* were quaſhed, the *capias ad ſatisfaciendum*, and the firſt *ſcire facias* bearing *teſte* on one and the ſame day. *Barnes* 95.

But the *ſcire facias* againſt the bail may bear *teſte* the very day of the return of the *capias ad ſatisfaciendum*, againſt the principal. *Lord Raym.* 1567.

The *ſcire facias* muſt not bear *teſte* on a Sunday, for it is not *dies juridicus*. Dy. 168. a.

The *ſcire facias* muſt be returnable, as the original proceedings are; that is, at a day certain, or a common return. *Lord Raym.* 1417.

If there be fifteen days between the *teſte* of the firſt, and the return of the ſecond *ſcire facias* againſt bail, it is ſufficient, without any regard to the number of days between the *teſte* and return of each writ. *Elliot* v. *Smith*, *Stra.* 1197.

A *ſcire facias* againſt bail muſt be in the ſheriff's office at leaſt four days before the return. *Miller* v. *Yarroway*, *Burr. Rep.* 4 *pt.* 1723.

Every *alias ſcire facias* muſt be four days in the office before the return thereof. *Rule*, *Eaſt.* 5 *Geo.* 2.

Every *ſcire facias*, on which *ſcire feci* is returned, ought to be delivered to the ſheriff, or left in his office four days excluſive before the return. *Ibid.*

The ſheriff muſt indorſe the time of his receiving a *ſcire facias*.

The *alias ſcire facias* differs from the firſt only in the *teſte* and the return, and adding after "we command you" "as before we have commanded you."

A *ſcire facias* is an action and requires a new warrant of attorney. *Lord Raym.* 1048, 1253.

If there be no *capias ad ſatisfaciendum* ſued out, returned, and filed, it is no ground for a motion to quaſh the *ſcire facias*, but the bail muſt plead it.

A *capias ad ſatisfaciendum* may be void as to the principal, and yet ground a *ſcire facias* againſt the bail, as if ſued out above a year after the judgment, without reviving the judgment by *ſcire facias*; for the bail are ſtrangers and cannot take advantage of that error

error in a collateral action. 2 *Lord Raym.* 1096. 6 *Mod.* 304. *Holt* 90.

Motion to ſtay proceeding againſt one of the bail who had been objected to, and had not juſtified, but had omitted to get his name ſtruck out of the bail-piece, the court denied the motion in the preſent form, as in *Falk* and *Birk*, 4 *Geo.* 3. ſaying that whilſt the name remained of record, proceedings could not regularly be ſtaid; but, as in that caſe, they now give leave to enter an *exoneratur* in the bail piece *nunc pro tunc* on payment of coſts. *Humphrey* v. *Leite*, *Burr.* 4 *pt.* 2107.

Motion to ſtay proceedings againſt bail, the *capias ad ſatisfaciendum* was returnable the laſt return of Michaelmas term, *viz.* 28 November, and the principal died the 1ſt December, the *capias ad ſatisfaciendum* being then in the ſheriff's office, and not actually returned until the 3d December, and the motion was denied. *Boyland* v. *Cook, and other Bail of Porter.* *B. R.* 1748.

But where the principal died after a *capias ad ſatisfaciendum* returned, and before it was filed, the court, on motion, ſtayed the filing in favour of the bail. 1 *Lill. Abr.* 183. *Mich.* 33 *Car.* 2.

A *capias ad ſatisfaciendum* made returnable at a day out of term would not be void, although liable to be ſet aſide on motion; nor can ſuch a defect be taken advantage of by bail upon a general demurrer to a *ſcire facias* brought againſt them. *Burr. Rep.* 4 *pt.* 1187.

An action was brought againſt the bail, and afterwards the plaintiff was obliged to deſiſt therein; and then the bail ſurrendered the principal before a new action brought, and moved to ſtay the proceedings; the court held the ſurrender to be good, it being before the return of the proceſs in the ſuit, and it was the fault of the plaintiff not to begin right at firſt. *Hoare* v. *Mingay, one, &c.* *Stra.* 915.

In an action of aſſault and battery the plaintiff procured a judge's order to hold the defendant to bail for one hundred and forty pounds, whereupon the defendant became bound in two hundred and eighty pounds,

pounds, and the bail, jointly and severally, in one hundred and forty pounds. The plaintiff had a verdict for three hundred pounds, and brought separate actions on the recognizance against the bail, who moved the court, that on payment of one sum of one hundred and forty pounds, and costs, the proceedings might be stayed, and compared this to an action on bond. But the plaintiff insisted there was a difference, for in a bond the condition is to pay the money, and if one obligor pays it the other is discharged, as the condition is complied with; but in a recognizance the condition is not satisfied until the damages recovered be paid, or the defendant rendered. And it was held, that the bail being jointly and severally bound, the actions against them could not be discharged, unless the condition of the recognizance was performed, *viz.* that the defendant paid what was recovered, or surrendered. *Calvert and Ux* v. *Pinhero. Mich.* 12 *Geo.* 2. *C. B. Barnes* 74

The bail for one who was convicted afterwards for a felony, brought up the body by *habeas corpus*, and the court allowed them to surrender him in discharge of themselves. *Stra.* 1217.

A judgment was obtained against the defendant, who surrendered before the return of the *capias ad satisfaciendum*, but did not give the plaintiff notice, nor get the bail-piece discharged. The plaintiff proceeded to judgment against the bail on a *scire facias*, and the court would not relieve them on motion, because no *exoneratur* was entered, and a *scire facias* returned, and put them to their *audita querela*. Salk. 101.

The allowance of a bankrupt's certificate has no relation back to discharge the bail, if fixed before such allowance. 2 *Blackst. Rep.* 811,

A creditor who obtains a verdict against a bankrupt before the issuing the commission, is intitled to prove his costs as well as his debt, under the commission, although judgment was not signed until after the commission issued. But by proving his debt, and acting under the commission, he makes his election, and shall not afterwards resort to the bail.

Aylet

Aylet v. *Hurford and Richards, Bail of Lowe. Tr.* 16 *Geo.* 3, *C. B.* 2 *Blackst. Rep.* 1317.

The plaintiff in order to proceed against the bail, took out a *capias ad satisfaciendum* on the 3d of December; on the 4th a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*, and then waiting until the writ of error was at an end, proceeded by *scire facias* against the bail; and on motion all the proceedings were set aside, for the ground of them, the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopt all proceedings; and the sheriff could not so much as look after the defendant. *Stra.* 1186. 1 *Wilf.* 16.

A Writ of error is a *supersedeas* from the time of the allowance, and that is notice of itself; or if the party have notice thereof before the allowance, it is even from that notice a *supersedeas*. Burr. Rep. 4 pt. 340. Say 51.

The plaintiff got judgment, took out a *capias ad satisfaciendum*, and had a *non est inventus* returned, error was brought, and two days after the plaintiff sued out a *scire facias* against the bail, who moved to stay the proceedings therein as in cases where the plaintiff brings an action of debt upon the judgment, pending error, insisting that it was more reasonable in this case, because otherwise the bail might loose the advantage of discharging themselves, by surrendering the principal, which they can do at any time before the return of the second *scire facias*; and the court thought it reasonable that the proceedings should be stayed on the bails consenting, that if the judgment should be affirmed they would surrender the principal, or give judgment on the *scire facias*. Myer *v.* Arthur, Stra. 419.

But on a like motion, it appearing that bail was not put in upon the writ of error, so as to make it an absolute *supersedeas*, the court refused to stay the the proceedings on the *scire facias*, saying that they would not go one step further than the case of *Myer* v. *Arthur*, *Stra.* 781.

The

The second *scire facias* was returned, and a four day rule given, on the fourth day of which error being brought on the principal judgment, the bail moved to stay proceedings on the *scire facias*, and cited *Myer* v. *Arthur*. But *Per Cur.* that differed, for there the bail came in time, whilst they might surrender, which they cannot do here, after the return of the second *scire facias*, at which time no writ of error was brought. Rule denied. *Everett* v. *Gery*, *Stra.* 443.

When the bail do not apply to stay proceedings, pending error, until their time to surrender is out, the court will not give them any time for that purpose; but only four days to pay the money in after the judgment shall be affirmed. *Richardson* v. *Jelly*, *Stra.* 443.

The bail in the original action in which a writ of error is brought, are not liable to the costs in error.

The second *scire facias* was returnable the first day of the term, and a week within the term the bail moved to stay proceedings upon the common terms of giving judgment on the *scire facias*, and taking four days to surrender after the affirmance of the judgment. But the court said they came too late, after the time for surrender was gone, and would not revive it; all they would do was to stay the suing out execution against them until after the affirmance of the judgment. *Cole* v. *Buckland*, *Stra.* 872.

The plaintiff got judgment on the *scire facias* against bail pending error by the principal, and took them in execution; they now moved to be discharged *Sed. per. Cur.* Though you might have applied and had the proceedings stayed, yet we will not set them aside. If an action of debt had been brought upon the judgment we would have granted an imparlance had it been asked; but we never set aside the judgment when once signed; because we take it, that by not applying in time you have submitted to meet the plaintiff. *Fisher* v. *Emerton*, *Stra.* 526.

After a judgment on *scire facias* against bail, the bail moved to stay execution, the principal having brought error on, undertaking to pay the condemnation-money, and the costs on the *scire facias* in four

days after affirmance. But there being no bail on the writ of error the court made the bail also undertake to pay the costs on the writ of error, saying, it was a favour that they were asking; and they would make them submit to equitable terms. *Ritson* v. *Francis, bail of Nash, Stra.* 877.

Error brought in *cam. scacc.* on a judgment in *B. R.* and writs of *scire facias* had issued against the bail in the original action in *B. R.* where the bail obtained a rule to stay the proceeding on the *scire facias*'s until the writ of error in *cam. scacc.* should be determined, undertaking to pay the debt and damages within four days after affirmance of the judgment. The judgment was affirmed in *cam. scacc.* and afterwards the original defendant brought error returnable in parliament to reverse the judgment given in *cam. scacc.* on which the bail moved to stay proceedings against them until that writ of error was determined; and although it was objected that the bail were bound by the express terms in the former rule, the court made the rule absolute, holding that the word "affirmance" in the first rule must necessarily be understood to mean "final affirmance." *Kershaw* v. *Cartwright and Pearce, bail of Green, Burr.* 4 *pt.* 2819.

A man may plead in abatement or bar to a *scire facias* as well as to other actions. *Lucas* 112.

Payment of the sum recovered may be pleaded to a *scire facias* as to an action of debt. 4 & 5 *Ann. c.* 16. *s.* 12.

Notice of surrender to the plaintiff, or his attorney, is required, that the plaintiff may, if he pleases, charge the defendant in execution; also that he may not be at any further trouble or charge against the bail. *Leon.* 58. 2 *Bulst.* 268. *Moor* 883.

Scire facias against the defendant, as bail for *A. B. C.* and *D.* plea, that before the return of the second *scire facias* the plaintiff took *A.* in execution, and still detains him.—Demurrer *inde.* It was argued for the defendant, that the plaintiff having taken one of the principals in execution, disabled the bail to render him; and therefore discharged him as to all the rest. *Sed per Cur.* The bail have undertaken

to bring in all four principals; and therefore, though the plaintiff hath taken one, this doth not discharge the bail as to the other three; for they ought, as they took upon them, to bring them in all four. 2 *Lev.* 192. 1 *Vent.* 315.

Formerly if the plaintiff recovered a larger sum than the action was laid for, the bail were not liable. 1 *Salk.* 102. But now where he declares for or recovers a larger sum than is expressed in the process, on which he declares, the bail shall not be discharged, but shall be liable for so much as is sworn to or indorsed on the process, or for any less sum that the plaintiff shall recover. *East.* 5 *Geo.* 2.

Though the recognizance be to levy of the lands and chattels; yet execution by the body is good. 1 *Lev.* 225. 1 *Sid.* 339. 2 *Keb.* 269, 274. 2 *Sid.* 12. 2 *Inst.* 395.

A *capias ad satisfaciendum* may be taken out against bail, without any *fieri facias* previously issued or return of *nulla bona*. Elliot *v.* Smith, Stra. 1139.

If bail bring error upon award of execution in a *scire facias* against the award, matter which lies properly in the mouth of the principal, or which might have been pleaded to the *scire facias*, is not assignable for error. *Wraight* v. *Kitchingman*, *Stra.* 197. *Salk.* 262. 4 *Mod.* 306.

Judgement on *scire facias* against bail was reversed for want of a warrant of attorney. *Salk.* 603.

In *scire facias* against bail, the plaintiff mistook in setting out the recognizance, upon which the defendant pleaded *nul tiel record*. The plaintiff moved to amend, but was denied, for a *scire facias* against bail is never amended; and the course is, for the plaintiff to quash his own writ. This may be to defeat the bail of an opportunity to surrender, which he would have done, if he could not have been sure of proceeding in his plea. *Grey* v. *Jefferson*, *Stra.* 1165.

Plea to a *scire facias* against bail, that "before the issuing the first writ of *scire facias*, and before the issuing of any writ of *capias ad satisfaciendum* against the principal, he died," to the which the plaintiff replied, "that the principal is living at and traversed

ſed that he died before the iſſuing of the writ of *capias ad ſatisfaciendum*." Demurrer, *inde*, and joinder, and objected, that the plaintiff had traverſed the death of the principal before the iſſuing of the ſaid writ of *capias ad ſatisfaciendum*, when there was no ſuch writ ſet forth by the defendants in their plea; but only a general allegation "before the iſſuing any writ of *capias ad ſatisfaciendum*;" which is uncertain, therefore the plaintiff in his replication ought to have ſet forth the time when the *capias ad ſatisfaciendum* iſſued; and the ſheriff returned *non eſt inventus*; like debt on a bond for performance of covenants in an indenture the defendant cannot plead performance generally, without ſetting forth the indenture. The replication was adjudged ill, and the court being ready to give judgment, the plaintiff prayed leave to diſcontinue, which was granted. *Carth.* 4.

Motion to ſtay proceedings againſt one of the bail, who had been objected to and had not juſtified, but had omitted to get his name ſtruck out of the bail-piece; the court denied the motion in the preſent form, as in *Falkland* and *Birk*, 4 *Geo.* 3. ſaying that, whilſt the name remained of record, proceedings could not regularly be ſtaid; but as in that caſe, they now gave leave to enter an *exoneratur* on the bail-piece *nunc pro tunc* on payment of coſts. *Humphry* v. *Leite*, *Burr.* 4. *pt.* 2107.

Chap. XXX.

Of proceedings by original.

THE original writ iſſues out of the court of chancery, which is *officina juſtitiae*, the ſhop of juſtice in which all the king's writs are framed. It is a mandatory letter from the king, in parchment, directed to the ſheriff of the county wherein the injury is, or is ſuppoſed to be committed, requiring him to command the party accuſed either to do juſtice to the complainant, or elſe to appear in court and anſwer

the accuſation againſt him, and ſealed with the great ſeal. *Finch L.* 237.

Theſe writs are demandable of common right on paying the uſual fees, for any delay in, or the ſetting an unuſual price for granting them, would be a breach of *magna charta*, *c.* 29. "nulli vendemus, nulli negabimus aut differemus juſtitiam vel rectum."

Original writs are *teſted* or witneſſed in the king's own name, "witneſs ourſelf at Weſtminſter," or wherever the chancery may be held, and are returnable not on a day certain, but on one of the general return days of the term, and not at Weſtminſter as in the court of common pleas, which are now fixed there by *magna charta*; but "ubicunque fuerimus in anglia," whereſoever we ſhall then be in England, as the king's bench, is removable into any part of England at the diſcretion of the crown.

The pleas which this court can hold by original writ are caſe, treſpaſs, ejectment, replevin; and the better opinion, although ſometimes doubted, ſeems to be alſo of debt; but it is ſaid that no other action can be proſecuted in this court by original writ between ſubject and ſubject in the firſt inſtance; but all other actions may be removed hither from other courts, by writs in the nature of originals, as writs of *error*, *certiorari*, &c.

The action of debt not being proſecuted in the court by original, which may be the reaſon why it has been thought not to lie, is, that the plaintiff ſuing by original in debt would be obliged to pay the fine due to the king, to the curſitor, upon ſuing out the original writ, in proportion to the demand.

In ſuits by original, if the defendant cannot be arreſted, he may be outlawed.

In ſuits againſt bodies corporate or hundred or againſt peers or priviledged perſons, the plaintiff may have proceſs of attachment, and diſtreſs infinite, to compel appearance; and if a writ of error is brought upon a judgment had in a ſuit by original, it muſt be made returnable in parliament, and not in the exchequer chamber; as it is when brought on a judg-

men

ment in this court by bill according to the ſtatute 27 *Eliz. c.* 8.

Original writs are either optional or peremptory, that is to ſay either a *præcipe* or a *ſi te fecerit ſecurum*. Finch L. 257.

The *præcipe* is in the alternative, commanding the defendant to do the thing required, or to ſhew the reaſon why he hath not ſo done; this is in caſes where ſomething certain is demanded by the plaintiff, which it is incumbent upon the defendant to perform, as to reſtore poſſeſſion of land, pay a liquidated debt, or the like, where the writ is drawn in the form of a *præcipe*, or command, to do this, or ſhew cauſe to the contrary; giving the defendant his choice to redreſs the injury or ſtand the ſuit.

The *ſi te fecerit ſecurum*, ſo called from the words of the writ, directs the ſheriff to cauſe the defendant to appear in court, without allowing him any option, provided the plaintiff gives the ſheriff ſecurity to proſecute his claim; (which ſecurity is now always given by the ſame obliging gentleman, thoſe conſtant friends of every plaintiff, *John Doe* and *Richard Roe*) and is in uſe where nothing ſpecific is demanded, but only a ſatisfaction in general; to aſcertain the meaſure of which, the intervention of ſome judicature is required, ſuch as writs of treſpaſs, or on the caſe, where nothing certain or ſpecific is ſued for, but only damages which are to be aſſeſſed by a jury.

Præcipe.

George the Third by the grace of God, of Great Britain, France and Ireland, king defender of the faith, and ſo forth: To the ſheriff of Middleſex, greeting: Command *Benjamin Black*, late of Brentford, gentleman, that juſtly, and without delay, he render to *William White*, one hundred pounds, which he owes to, and unjuſtly detains, as he ſaith; and unleſs he ſhall ſo do, and the ſaid *William* ſhall make you ſecure of proſecuting his claim, then ſummon, by good ſummoners, the aforeſaid *Benjamin* that he be before us on (a general return-day) wherſoever we ſhall then be in England to ſhew wherefore

fore he hath not done it. And have you there then the ſummoners and this writ. Witneſs ourſelf at Weſtminſter, the Day of in the Year of our reign

Pledges of profecution, { *John Doe* and *Richard Roe.* } Summoners of the within nam'd *Benjamin Black.* { *John Den* *Richard Fen* } { Sheriff's return.

Si te fecerit ſecurum.

George the Third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and ſo forth: To the ſheriff of Middleſex, greeting: If *William White* ſhall give you ſecurity of proſecuting his claim, then put by gages and ſafe pledges, *Benjamin Black*, late of Brentford, gentleman, ſo that he be before us on (a general return-day) wherefoever we ſhall then be in England, to ſhew (here is ſet forth the whole declaration, concluding) to the ſaid *William* his damage of as it is ſaid) and have you there the names of the pledges, and this writ. Witneſs ourſelves at Weſtminſter the day of in the year of our reign

Pledges of proſecution { *John Doe* and *Richard Roe.* } The within named *Benjamin Black* is attached by pledges. { *John Den* and *Richard Fen* } { Sheriffs return.

In ſuits by original, the debt muſt amount to ten pounds. 5 *Geo.* 2. *c.* 27.

The *præcipe* on which the original is to be made out muſt contain the whole of the declaration, in which muſt be ſet forth the defendant's eſtate, degree, or myſtery, and the town or hamlet, or place and county, where he is, or was converſant.

Præcipe *for an original in debt.*

Middleſex, to wit. Command *Benjamin Black*, late of Brentford, in the ſaid county, gentleman, that juſtly, &c. he render to *William White*, one hundred pounds, of lawful money of Great Britain, which he owes to and unjuſtly detains from him, as it is ſaid, &c. and unleſs, &c.

Geor

Capias *thereupon.*

George the third, &c. to the ſheriff of Middleſex, greeting: We command you, that you take *Benjamin Black*, late of Brentford, in your county, gentleman, if he be found in your bailiwick, and him ſafely keep, ſo that you have his body before us on (a general return day) whereſoever we ſhall then be in England, to anſwer *William White* in a plea, that he render to him one hundred pounds which he owes to, and unjuſtly detains from him, as is ſaid, and have there then this writ. Witneſs, &c.

Præcipe *for an original in caſe.*

Middleſex to wit. If *William White* make you ſecure, then put, &c. *Benjamin Black*, late of Brentford, in the ſaid county, gentleman, that he be before us on (a general return day) whereſoever, &c. to ſhew, for that whereas (here is inſerted the whole declaration concluding to the ſaid *William* his damage of as it is ſaid)

Capias *thereupon.*

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you, that you take *Benjamin Black*, late of Brentford in your county, gentleman, if he be found in your bailiwick, and him ſafely keep, ſo that you have his body before us on (a general return-day) whereſoever we ſhall then be in England, to anſwer *William White* in a plea, for that whereas (to the end of the *præcipe*) to the ſaid *William* his damage of as it is ſaid. and have there this writ. Witneſs, *William* earl Mansfield at Weſtminſter, the day of , in the year of our reign.

A. B. attorney,

Bail for

The *præcipe* is made out upon a ſtamped paper, and taken to the filazers, who makes out the *capias* to the ſheriff of the county where defendant is to be met with, paying him 5*s.* 4*d.* for the firſt count, and 1*s.* for every other; ſealing 7*d.* If there be an affidavit of the debt the defendant ſwears it before the filazer

filazer, or before a judge of the court, there is paid to the ſheriff for his warrant 2*s.* 4*d.* but the *capias* is commonly made out by the attorney for the ſake of expedition.

There are paid on original writs where the damages exceed 40*s.* fines to the king, in the following proportions:

	l.	*s.*	*d.*
From 40*l.* to 100 marks	0	6	8
From 100 marks to 100*l.*	0	10	0
From 100*l.* to 200 marks	0	13	4
From 133*l.* 6*s.* 8*d.* to 166*l.* 13*s.* 4*d.*	0	16	8
From 166*l.* 13*s.* 4*d.* to 200*l.*	1	0	0
And for every 100 marks more	0	6	8
And for every 100*l.* more	0	10	0

If the *capias* is at the ſuit of an executor or adminiſtrator, the words "owes to," are omitted, and it only ſays "unjuſtly detains from."

If defendant cannot be taken on the *capias*, the plaintiff may ſue out an *alias*, and after that a *pluries*, only adding the words to the *alias*, "as formerly we have commanded you;" to the *pluries*, "as oftentimes we have commanded you."

If the defendant cannot be found in the county where the writ firſt iſſued, or where the plaintiff intends trying the cauſe, then a *teſtatum capias* muſt be ſued out againſt him into that county where he is to be met with, directed to the ſheriff of that county, in which, after the words "as is ſaid," is added, "and our ſheriff of Middleſex, at a certain day now paſt, returned to us, that the ſaid *Benjamin* was not to be found in his bailiwick, whereupon it is teſtified in our ſame court before us, that the ſaid *Benjamin* lurks and wanders up and down in your county, and have there this writ." Witneſs, &c.

The *teſte* of the *alias* is on the *quarto die poſt* of the return of the *capias*, and the *teſte* of the *pluries*, is the ſame of the *alias*.

The *teſtatum* may be had in the firſt inſtance, without really ſuing out the *capias*, but the filazer is to be paid for the *capias* which he ought to make out, to warrant the *teſtatum*.

The

These writs are taken to the sheriff's office (if bailable) for warrants thereon, for which warrants are paid 2*s*. 4*d*. each. Officer, for arrest, 10*s*. 6*d*.

If the writs are not bailable there must be an English notice for the defendant to appear, as at the end of a common writ, and the attorney's name and place of abode indorsed.

The appearance is by a note filed with the filazer, for which is paid 2*s*. 6*d*.

Appearance.

Middlesex, to wit. Appearance for *Benjamin Black* at the suit of *William White* to a *capias* returnable on the morrow of All Souls, wheresoever, &c.

C. D. attorney.

On a *capias* returnable on any other than the first return of the term, the defendant has eight days to appear from the *quarto die post* of the return.

If the action requires special bail, and the writ upon which the defendant is arrested, is returnable on any other return than the first, and the defendant lives within twenty miles of London, he has four days after the *quarto die post*, to put in special bail, and if above twenty miles, six days from the *quarto die post*, but when returnable on the first return, if in London or Middlesex, four days, in the country above twenty miles, six days.

Bail on action by original is to be put in the county where the *capias* issues, for which purpose application must be made to the filazer for a short copy of the *capias*, with the sum sworn to marked thereon, a note is then to be made for the filazer with the names of the plaintiff and defendant, and also the names and additions of the bail on a slip of paper.

Note.

Middlesex. *William White* against *Benjamin Black*. The bail are *Richard Red*, of Cheapside, London, linen draper, and *Bartholomew Brown*, of Lombard-street, London, goldsmith.

C. D. attorney. Sworn to 25*l*.

The filazer must attend with the bail at the judge's chambers, (in term time he attends there regularly),

and take their recognizance in double the ſum ſworn to, for which he is paid, 16*s.* 6*d.*

Notice is to be given to the plaintiff's attorney the ſame as in other caſes, only ſaying, "put in with the filazer, at the honourable Mr. juſtice chambers."

If the plaintiff excepts, he doth it in the filazer's book within twenty days.

On an exception to the bail, notice is given to juſtify in the ſame manner as when the action is by bill, and there are the ſame days allowed. On the day of juſtification the filazer muſt attend Weſtminſter with his book, counſel to move 10*s.* 6*d.* filazer 7*s.* 6*d.* court fees 9*s.* an affidavit of the ſervice of the notice is to be made as before directed.

The plaintiff may rule the ſheriff to return his writ, and bring in the body, in the ſame manner as when the proceedings are by bill.

The plaintiff may deliver his declaration *de bene eſſe*, upon the *quarto die poſt* of the return of the writ, and the defendant has the ſame time to plead, as by bill, and it is filed with the clerk of the declarations in the ſame manner.

Declaration in caſe.

Middleſex, to wit. *Benjamin Black*, late of Brentford, in the ſaid county, gentleman, was attached to anſwer *William White*, in a plea of treſpaſs on the caſe, and whereupon the ſaid *William*, by *A. B.* his attorney, complains for that whereas, (to the end of the *praecipe* as far as the damages), "and therefore he brings ſuit, &c.

If the action be in debt, "the defendant was ſummoned to anſwer," inſtead of "attached."

If a *capias* iſſue into one county, and the declaration is laid in another, the bail are diſcharged though it is good againſt the principal, 3 *Lev.* 235. 245. otherwiſe when the action is by bill.

The defendant was not formerly bound to plead till he had oyer and a copy of the original, if he demanded it, but now he cannot have it, *Rule, Trin.*

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Geo. 3. and if he demands it, the plaintiff may ſign judgment without giving it, if no plea filed. *Ibid.*

The plea (if ſpecial) is filed with the clerk of the papers; if general, it may either be entered with the clerk of the judgments in the plea-book there, or delivered to the attorney.

The clerk of the papers alſo makes up the paper book by original, if there is a ſpecial plea filed.

But the attorney makes up the iſſue, if the plea be general, and he begins with the declaration firſt, (as there is no memorandum by original), and it may be done without an imparlance, (although the plea be of a different term to the iſſue), as there is no ſuch thing as a plea or imparlance roll in this court, nor is it error after verdict, for all thoſe things are cured by the ſtatutes of jeofails.

The award of the *venire* muſt be thus: "Therefore it is commanded to the ſheriff, that he cauſe to come before our lord the king, (on a general return day) whereſoever we ſhall then be in England, twelve, &c. by whom, &c. and who neither, &c. becauſe as well, &c."

In making up the record, two *placitas* are put as when the action is by bill, and at the end of the iſſue (the *jurata* is entered thus):

Middleſex, to wit. The jury between *William White*, by his attorney, plaintiff, and *Benjamin Black*, late of Brentford, in the ſaid county, gentleman, defendant of a plea of treſpaſs on the caſe, is reſpited before our lord the king, until (a general return day) whereſoever he ſhall then be in England, unleſs, &c.

The record is paſſed at the ſame place as when the action is by bill, the iſſue to be entered at the clerk of the judgments, *venire* and *diſtringas* are exactly the ſame (except the return) which muſt be of a general return-day, "whereſoever &c." and the defendant's addition muſt alſo be put in; the *venire* and *diſtringas* are ſealed, paying 7*d.* each, the *ſubpœna*, which is as in other caſes is ſigned, paying 1*s.* 8*d.* and ſealing 7*d.*

If the defendant ſuffers judgment to go by default, it is ſigned in caſe on a treble penny (in debt on a double half-crown) ſtamp-paper, warrants

of attorney are entered upon the roll, but no memorandum, beginning with the declaration, and the judgment is ſigned at the clerk of the judgments, as when by bill.

Writ of inquiry on judgment by original.

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas *Benjamin Black*, late of Brentford, in your county, gentleman, was attached to appear in our court before us, to anſwer *William White* of a plea, "for that whereas (to the end of the declaration and it then proceeds, exactly the ſame as in actions by bill, only it muſt be returnable on a general return-day, "whereſoever, &c.") ſealing 7*d.*

The ſheriff executes the writ of inquiry, and final judgment is ſigned in the ſame manner as in actions by bill. The writ of execution is ſealed only, paying 7*d.* warrant 2*s* 4*d.*

If there is occaſion to amend, application muſt be made by petition to the maſter of the rolls for leave to amend the original firſt, and then a ſummons from a judge to amend the declaration, which will be ordered upon payment of coſts, on the ſame terms as in proceedings by bill; the petition muſt ſtate the proceedings, and the alteration to be made.

Petition to amend an original.

"To the Right Honourable the Maſter of the Rolls,

The humble Petition of the plaintiff *William White*.

Humbly ſheweth,

THAT in term, in the year of the reign of his preſent majeſty, your petitioner commenced an action at law in his majeſty's court of king's bench, by original writ, returnable on (the return of the original) whereſoever, &c. on a promiſſory note of hand for the ſum of five hundred pounds, drawn by the defendant, payable to your petitioner or order, with intereſt, and which note bears date the day of and your petitioner

petitioner hath laid his damage to five hundred and ten pounds.

That the ſaid defendant appeared in term laſt paſt, and your petitioner hath ſigned an interlocutory judgment for want of returning the paper-book, and hath given notice of executing a writ of inquiry of damages for the day of inſtant.

That by the great delay made on the part of the defendant, your petitioner's debt, with intereſt, amounts to five hundred and twenty-five pounds, which exceeds the damages laid in the ſaid original writ, and that in conſequence thereof your petitioner hath not as yet executed his writ of inquiry.

"Your petitioner, therefore, moſt humbly prays your honour, that the curſitor may be directed to amend the original, by ſtriking out the words five hundred and ten pounds, and inſerting in the ſtead thereof, the words five hundred and thirty pounds."

"And your petitioner ſhall ever pray, &c."

This petition is to be taken to the ſecretaries office in the rolls, paying 5*s*. 6*d*. and when anſwered, taken to the curſitor with the original, who will alter, and get it be ſealed, paying 4*s*. 6*d*.

An original writ muſt not bear *teſte* before the cauſe of action accrued. *Burr. Rep.* 4 *pt.* 967.

But if the plaintiff doth not mean to proceed to outlawry, a *capias* may bear *teſte* before the original, and even before the cauſe of action accrued, ſo it be actually taken out afterwards; for the defendant cannot have oyer of the *capias* ſo as to take advantage of it.

The original may be teſted at any time in vacation but muſt be returnable on a general return-day in term, and muſt have fifteen days between the *teſte* and the return; the reaſon why there ought to be fifteen days between the *teſte* and return of original writs is, becauſe in any day a man may go a day's journey, which in law is accounted twenty miles, and is called *dieta*, and according to that computation, fifteen days are a competent time for a man to appear.

appear in whatsoever part of the kingdom he lives. 5 *Inst.* 267.

But although fifteen days are required between the *teste* and the return of an original writ, the want thereof is made good by the defendant's pleading in chief, although an outlawry upon such writ would be erroneous, *Ld. Raym.* 671.

Chap. XXXI.

Of proceedings by and against attornies.

IF an attorney means to sue as a privileged person, he must sue out an attachment of privilege, which is signed *gratis*, sealing 7*d.* and a *præcipe* is to be left in the office at the time of signing. *Rule, Hil.* 20 *Geo.* 2.

Attachment of privilege.

George the Third, &c. To the sheriff of Middlesex, greeting: We command you, that you attach *Benjamin Black*, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, on next after to answer *William White*, gentleman, one of the attornies of our court, before us, according to the liberties and privileges of such attornies, and other ministers of the same court, from the time whereof the memory of man is not to the contrary, used and approved of in the same, of a plea of trespass, and also to a bill of the said *William*, to be exhibited against the said *Benjamin*, for one hundred pounds, upon promises, according to the custom of our court, before us, and that you have there then this writ. Witness *William* earl Mansfield, at Westminster, the day of in the year of our reign.

William White, in person.

Bail for 50 l.

Stormont and *Wa*

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This attachment is to be ingroſſed on a 2*s.* 6*d.* ſtampt parchment, and a *præcipe* made for the office, as in other caſes, deſcribing it an attachment of priviledge.

If the action is not bailable, the *ac etiam* is left out, and the notice to appear to it added, as in a *latitat*, or bill of Middleſex.

The declaration is ingroſſed on a treble 1*d.* ſtampt payer, the form of which is as follows:

Declaration.

Middleſex, to wit. *William White*, gentleman, one of the attornies of the court of our lord the king, before the king himſelf, according to the liberties and privileges of the ſame court, complains of *Benjamin Black* being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf, of a plea of treſpaſs on the caſe; for that whereas (as in other caſes with pledges at the end.)

If an attorney delivers or files his declaration, and gives notice thereof, four days excluſive before the end of the term the attachment was returnable, the defendant muſt plead as of that term, if a rule to plead be given, and plea demanded. But if he does not deliver his declaration before the eſſoign-day of the ſubſequent term, the defendant will have an imparlance to the next term following. *R. Mich.* 5 *Ann.*

All the other proceedings are exactly as in common caſes.

Proceedings againſt attornies.

An attorney cannot (but in ſome particular caſes) be arreſted, he being ſuppoſed always to be in court; he therefore muſt be proceeded againſt by bill, which is a copy of the declaration, ingroſſed on a treble penny ſtampt parchment, a copy of which is alſo delivered to the defendant with notice to plead in four days,

if

if it is filed four days exclusive of the end of the term and the defendant lives within twenty miles of London, and if he resides above twenty miles from London, or the action be laid in any other county than Middlesex or London, he has eight days time to plead. *R. Mich.* 5 *Ann. Mich.* 10 *Geo.* 2.

The bill.

Hilary term, in the twenty-third year of the reign of king George the Third.

Stormont and *Way.*

Middlesex, to wit. *William White* complains of *Benjamin Black*, gentleman, one of the attornies of the court of our lord the king, before the king himself, present here in court, in his own proper person, for that whereas (as in other cases) but instead of saying, "and therefore he brings suit," it says, "and therefore he prays relief, &c.

A. B. attorney for the plaintiff.

Defendant in person.

The Copy to be delivered to the defendant, is to be indorsed thus, "This is a true copy of a bill filed against you, as of this present Hilary term, and unless you plead thereto in four (or eight) days from the date hereof, judgment will be signed against you by default.

Nothing is charged for the copy, as the defendant is not bound to pay for it, nor the issue.

The bill is filed with the clerk of the declarations, paying 4*d.* a rule to plead given, and a plea demanded as in common cases; and if the defendant does not plead within the four (or eight) days, judgment signed, and a writ of inquiry is executed as in other cases.

If he pleads, the issue is made up with a memorandum.

The bill cannot be filed in vacation, as it must be done *sedente curia*, (but it has been done in many cases to save the statutes of limitation) nor shall any attorney, as a privileged person, be intitled to an imparlance, if the bill is filed in time. *Salk.* 544.

If

If an attorney is arrested by virtue of any process, unless it is with another, he must sue out his writ of privilege from the court, where he is attorney of, and cannot be discharged without, *Salk.* 544. before he signs the same, he must get a certificate from the master's clerk, of his being an attorney. The writ of privilege is signed gratis, sealing *qu.* and when taken to the sheriff's office, he will grant a warrant to discharge the defendant out of custody; paying 4*s.*

The writ of privilege.

George the Third, &c. To the sheriff of Middlesex, greeting: Whereas, according to the custom of our court before us at Westminster, hitherto used and approved of in the same, the attornies of the same court, before us, whilst they are prosecuting or defending suits and actions therein for their clients, ought not, nor have they, from time immemorial, been used to be compelled to answer before any of our justices or officers, or any other secular judges whatsoever, upon any pleas, plaints, or demands, which do not particularly belong to us, (pleas of freehold, felonies, and appeals excepted), save only before us, by bill, exhibited in our said court before us, and not by writ; and whereas, we have lately received information by the complaint of *Benjamin Black*, gentleman, one of the attornies of our said court before us, that several ill-disposed persons, intending to disquiet the said *Benjamin Black*, have issued forth and prosecuted out of our court before us, one or more writ or writs, or one or more precept or precepts, returnable in our said court, by you, against the said *Benjamin Black*, and threaten to arrest and detain him in your custody thereupon in suits which do not relate to us (or in pleas of freehold, felonies, or appeals excepted) whereby the said *Benjamin Black*, is unable to attend his said office as an attorney, upon several affairs and suits depending in our said court before us, which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court before us, and the liber-

ties and privileges thereof, but alſo to the great detriment of the ſaid *Benjamin Black* and his clients. And becauſe we are willing that the juriſdictions, privileges, and cuſtoms, for ſo long time uſed and approved in our ſaid court before us, ſhould be inviolably kept and obſerved: we command you, and every of you, that you deſiſt from taking the ſaid *Benjamin Black* into your cuſtody, upon any writ or writs, precept or precepts, other than ſuch as particularly concern us (pleas of freehold, felony, and appeals only excepted) and if the ſaid *Benjamin Black* be deſtrained in your cuſtody, by any writ or writs, precept or precepts, other then ſuch as particularly concern us, (pleas of freehold, felony, and appeals only excepted) that then you diſcharge the ſaid *Benjamin Black* out of your cuſtody, and ſuffer him to go at large, as you will anſwer the contrary at your peril; and that you inform the party or parties, plaintiff or plaintiffs, in the writs or precepts, that he, ſhe, or they may proſecute his, her, or their action or actions, ſuit or ſuits, in our court before us by bill to be exhibited in our ſaid court before us at Weſtminſter, againſt the ſaid *Benjamin Black*, if he, ſhe, or they ſhall think it expedient ſo to do. Witneſs, &c.

Stormont and *Way*.

An attorney ſhall not have privilege at the king's ſuit. 2 *Rol. Abr.* 274. *Bro. Superſedeas* 1. 9 *Hen.* 6. *c.* 44.

Nor unleſs there be the ſame remedy in his own court, therefore he ſhall not have his privilege when money is attached in his hands by foreign attachment in the ſheriff's court in London. *Saund.* 67. *Comb.* 52

An attorney of the king's bench ſhall not have privilege in an action real. *Saund.* 67.

An attorney has no privilege againſt the court of conſcience in London. *Burr. Rep.* 4 *pt.* 1583.

An attorney, executor, or adminiſtrator, ſhall not ſue or be ſued as a privileged perſon. 1 *Ld. Ray.* 533.

An attorney may have his privilege in ſuing a member of the univerſity. *Ld. Raym.* 342.

An attorney ſhall not have privilege when he joins or is joined in the ſame action with another. *Vent* 298. *Dyer* 277. *Godb.* 10.

An attorney has privilege to keep the *venue* in Middleſex when plaintiff, but not to change it thither when defendant. *Burr. Rep.* 4 *pt.* 2027. 2032.

An attorney's privilege continues no longer than he remains an acting attorney. *Burr. Rep.* 4 *pt.* 2113. 2116.

Rolls were anciently kept of the attornies in *B. R.* but ſince the ſtamp act, the rolls have been diſuſed, and a book ſtamped hath been kept, and the attornies names entered therein. *Stra.* 77.

The privilege of an attorney is the privilege of the court, and not his own perſonal privilege, and he may waive it. *Burr. Rep.* 4 *pt.* 2113.

An attorney having been arreſted, was bailed, and another action being brought againſt him in the ſame court, he pleaded his privilege, and it was adjudged that putting in bail to the firſt action did not diſcharge his privilege. *Carth.* 337.

Declaration by bill of Middleſex againſt an attorney of *B. R.* as acceptor of a bill of exchange, drawn upon him according to the cuſtom of merchants, to which he pleaded in abatement, that he was and ſtill is an attorney of *B. R.* and ought to have been ſued here by bill of privilege as an attorney, and not by bill of Middleſex. Demurrer, *inde*, and, joinder. *Per. Cur.* he muſt have his privilege. Judgment for defendant. *Cornforth* v. *Price*, *Hilary*, 20 *Geo.* 3.

An attorney has privilege in a *qui tam* action commenced againſt him. *Barnes* 48. *Att. Prac.* 54. *Stin.* 549.

If an attorney ſue by original he has no privilege, and cannot ſue in *propria perſona*. 2 *Lev.* 39. 2 *Stra.* 897. *Barnes* 479.

Motion that an attorney who was going to Ireland might put in ſpecial bail, denied. 1 *Mod.* 10.

An attorney of *B. R.* arreſted by *capias* on a ſpecial original out of the ſame court, is not entituled to his diſcharge by ſerving the ſheriff with a writ of privilege, but muſt plead it *ſub pede ſigilli*. Held in *C. B.* in an action for falſe impriſonment againſt the

ſheriff. *Grapley* v. *Shaw*, *Eaſt*. 16 *Geo*. 2. 2 *Blackſt. Rep*. 1085.

In an action againſt baron and feme, if the baron be an attorney, he cannot appear in perſon and put in bail for his wife; for he ſhall not have privilege in an action againſt him and his wife. 1 *Roll*. 380. *c*. 45.

No attorney or ſolicitor who ſhall be a priſoner in any goal, or priſon, or within the limits, rules, or liberties of any goal, or priſon, ſhall during his confinement in any goal or priſon; or within the limits, rules, or liberties of any goal or priſon, in his own name; or in the name of any other attorney or ſolicitor, ſue out any writ, or proceſs, under pain of being ſtruck off the roll and incapacitated. 12 *Geo*. 2. *c*. 13. *ſ*. 9.

This ſtatute only diſqualifies attornies, who are priſoners, from proſecuting, and not from defending ſuits.

An attorney commencing an action on a bail bond, aſſigned after his impriſonment, in an action begun before, is not within this ſtatute.

Attornies, in caſe of miſbehaviour, are ſubject to the cenſure of the court in which they are admitted, by motion, in a ſummary way, and may be ſtruck off the rolls, impriſoned, or otherwiſe puniſhed at the diſcretion of the court; the proceſs for this purpoſe is an attachment, which iſſuing at the ſuit of the king, as for a contempt of the court, is made out in the crown office.

An attorney cannot be leſſee in ejectment. *Mich*. 1654.

Nor bail in any action in the court of which he is an attorney. *Ibid*.

But attornies are often bail in contradiction to that rule. 8 *Mod* 338.

An attorney cannot be a commiſſioner to take bail. *Stat*. 4 *W*. *&* *M*. *c*. 4.

An *attachment of privilege*, in *B*. *R*. is but as *latitat*, and not as an original. 1 *Show*. 367.

Every attorney of this court who ſhall ſue out an attachment of privilege againſt any defendant, ſhall leave a *præcipe* with the ſigner of the writs, with the defendants names, not exceeding four in each writ, with

the return and day of ſigning ſuch writ with the agent or attorney's name, who ſued out the ſame, and all ſuch *præcipes* ſhall be entered upon the roll where the *præcipes* of *latitats*, and all other writs iſſuing out of the court are entered, and the officer who ſigns the writs in this court, ſhall not ſign ſuch attachment till a *præcipe* be left with him for that purpoſe. *Rule*, *H.* 20 *Geo.* 2.

If an attorney delivers his declaration four days, excluſive before the end of the term in which the attachment is returnable, and enters a rule to plead, and demands a plea, the defendant ſhall be obliged to plead as of that term. And if he doth not deliver his declaration in that time, the defendant ſhall be entitled to an imparlance; and if he doth not deliver his declaration before the eſſoign day of the ſubſequent term, the defendant may have an imparlance to the term next following.

If the action be laid in London or Middleſex, and the attorney, defendant, lives within twenty miles from London he has, upon a rule to plead given, four days time to plead, and if he lives above twenty miles from London, or the action is elſewhere than in London or Middleſex, he has eight days time to plead.

The remedy againſt attornies in this court is more ſpeedy than that againſt other perſons. And at the commencement of the ſuit the bill and the declaration are the ſame thing.

Of taxing an attorney's bill.

If an attorney refuſes to deliver his bill to his client ſigned, (which he muſt do one month before he can ſue for the ſame) he may take out a ſummons for that purpoſe before a judge; and if he does not on ſervice attend thereon, an order will be made to deliver it within a reaſonable time; which, if he neglect delivering upon affidavit of the ſervice of ſuch order, the court will grant an attachment.

Where the bill is delivered, the client may apply to a judge for a ſummons, to ſhew cauſe why it ſhould not be referred to the maſter to be taxed, upon

on which an order will be made on the client's undertaking in the judge's book, "to pay the attorney what ſhall appear to be due to him upon ſuch taxation;" if the attorney doth not attend, an order is made of courſe.

The maſter's appointment muſt be had on the order, and a copy ſerved on the attorney, and if he doth not attend on the third appointing the maſter will proceed *ex parte*.

An attornies bill cannot be taxed at *niſi prius*, nor will it be gone into, the application muſt therefore be before plea pleaded.

Chap. XXXII.

Of proceeding againſt peers and members of the houſe of commons.

ALL peers without any diſtinction as to degree or rank, are intituled to the privilege of the peerage alike, for they are equally obliged to attend the ſervice of the public and are always ſuppoſed to be amenable to juſtice and to have ſufficient property to anſwer in ſuits and actions brought againſt them; and for theſe reaſons are not to be arreſted or moleſted in their perſons. *Bacon Abr. on Privilege*, 4 *Vol.* 228.

The exemption from arreſts extends to biſhops, members of the convocation. *Eq. Ca. Abr.* 349. *Chanc. Rep.* 31. and members of the houſe of commons.

By the ſtanding orders of both houſes of parliament, no court whatever ſhall preſume to determine concerning privilege of parliament, as ſettled by the rules and orders of each houſe; they themſelves claiming to be the ſole judges of their reſpective privileges, of which order the courts incidentally take notice.

By the twenty-third article of the act of union, *Stat.* 5 *Ann. c.* 8. the 16 Peers of Scotland ſhall have all the privileges of the peerage of parliament of Great Britain; alſo all the reſt of the peers of Scotland ſhall have

have all the privileges of the peerage of England, excepting only that of ſitting and voting in parliament. *Str.* 990. *Forteſc.* 163. *Peere Will.* 583.

Any perſon ſhall and may commence and proſecute any action or ſuit in any court of record, or court of equity, or admiralty, and in all cauſes matrimonial and teſtamentary, againſt any peer or lord of parliament of Great Britain, or againſt any of the knights, &c. of the houſe of commons of Great Britain for the time being, or againſt their or any of their menial ſervants, or any other perſon entitled to the privilege of parliament; and no ſuit, action, &c. ſhall be ſtaid by or under colour or pretence of any privilege of parliament."

Provided, that nothing in the ſtatute ſhall extend to ſubject the perſon of any of the knights, citizens, and burgeſſes, or the commiſſioners of ſhires, and burghs of the houſe of commons of Great Britain, for the time being, to be arreſted or impriſoned upon any ſuch ſuit or proceedings. *Stat.* 10 *Geo.* 3. *c.* 50.

Peers and members of the houſe of commons may be proceeded againſt by original writ, or by original bill, *Stat.* 12 & 13 *W.* 3; but they cannot be proceeded againſt in *B. R.* by original writ, but in thoſe actions only where the king's bench can hold plea of by original writ, as caſe, treſpaſs, ejectment, replevin, and debt.

On proceeding againſt a peer, as is moſt common, by original writ.

A *praecipe* is to be prepared for the original in the firſt inſtance and taken to the cuſtitor of the county, who will make out the original; and when ſealed, the ſheriff is to make out his ſummons thereon to the peer: a copy of the original is uſually made out by the plaintiff's attorney for the ſheriff, and that is ſerved as the ſummons on the defendant. In four days after the *quarto die poſt*, if defendant does not appear or caſt an eſſoign (which he may do before the return, but not afterwards), the filazer will, upon producing from the ſheriff the return of notice being given defendant, make out a *diſtringas* againſt the lands and chattels, which is ſealed, paying 7*d.* and a warrant is granted to diſtrain and levy 40*s.* If the defendant

fendant doth not appear at the return of *diſtringas*, the plaintiff's attorney muſt call upon the ſheriff to return the writ upon which he may ſue out an *alias*, and upon the return of that a pluries *diſtringas*; and the plaintiff may, by the 10 *Geo.* 2. c. 50. *ſ.* 3. move the court to increaſe the iſſues, which will be ordered to the amount of the demand.

This may be done by motion at ſide bar, or by counſel.

Præcipe *for original againſt a peer.*

Middleſex, to wit. If *William White* makes you ſecure, &c. then put, &c. the right honourable *Benjamin* lord *Black*, late of having privilege of parliament, that he be before us on (a general return-day) wheresoever, &c. to ſhew, "for that whereas" (here is ſet forth the whole of the declaration) to the damage of the ſaid *William*, of one hundred pounds, as he ſays.

Diſtringas *thereon.*

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you that you diſtrain the right honourable *Benjamin* lord *Black*, having privilege of parliament, by all his lands and chattels in your bailiwick, ſo that neither he, nor any one for him, do intermeddle therewith, until you ſhall have other command in that behalf from us; and that you anſwer us for the iſſues of the ſame, ſo that you have his body before us on (a general return) wheresoever, &c. to anſwer *William White* in a plea (reciting the original) to the damage of the ſaid *William*, of one hundred pounds, and have you then there this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

If the defendant appears, it is done with the filazer in this manner:

Appearance.

Middleſex. Appearance for the right honourable *Benjamin* lord *Black*, at the ſuit of *William White*.

C. D. attorney.

On

On entering the appearance, for which is paid 2s. 6d. and a certificate from the filazer of the appearance, the money, if any, that has been levied, is to be returned.

The declaration againſt a peer on original.

Middleſex, to wit. The right honourable *Benjamin* lord *Black*, having privilege of parliament, was ſummoned to anſwer *William White*, in a plea of treſpaſs on the caſe, and whereupon the ſa d *William*, by *A. B.* his attorney, complains, that whereas (reciting the original) but both in the *præcipe* and declaration, the words, "but contriving, &c. to deceive and defraud the ſaid *William* in this behalf," muſt be omitted; for the lords, conſcious, doubtleſs, of their own immaculateneſs, have adjudged it a very high contempt and miſdemeanor in any perſon to charge them with any ſpecies of fraud or deceit.

If the declaration is delivered within four days before the end of the term, the peer muſt plead if he lives within twenty miles of London, in four days.

Proceedings againſt a commoner by bill.

On proceeding againſt a commoner by bill, the bill is to be ingroſſed on a treble penny ſtamp-parchment, and filed with the clerk of the declarations; if in vacation, the bill muſt be filed as if on the preceding term.

The bill againſt a commoner.

Middleſex, to wit. *A. B.* complains of *C. D.* Eſq; having privilege of parliament, of a plea of treſpaſs on the caſe, for that whereas, &c. (reciting the whole declaration).

When the bill is filed, the following ſummons is to be made out, which is to be ingroſſed on a 2s. 6d.

ſtamp-parchment, ſigned by the ſigner of the writs, paying 1*s.* 8*d.* and 7*d.* ſealing, to ſheriff for his ſummons 2*s.* 4*d.* and to the officer for ſervice 5*s.*

Summons.

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you that you cauſe to be ſummoned *Benjamin Black*, Eſq; having privilege of parliament, that he be before us, to anſwer *William White* in a plea (as the caſe is) as he ſhall be able reaſonably to ſhew that he ought to anſwer therein, and have then there this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way.*

Præcipe for ſummons.

Middleſex. Writ of ſummons for *William White* againſt *Benjamin Black*, Eſq; (having privilege of parliament), returnable on

A. B. attorney.

If the defendant does not appear within four days after the writ is returnable, and the ſheriff hath returned him ſummoned, the *diſtringas* is to be ſued out, which is to be ingroſſed on a 2*s.* 6*d.* ſtamp-parchment, ſigned by the ſigner of the writs, ſigning 1*s.* 8*d.* ſealing 7*d.* warrant 2*s.* 4*d.* officer for the levy 10*s.*

Diſtringas.

George, &c. To the ſheriff of Middleſex, greeting: We command you that you diſtrain *Benjamin Black*, Eſq; having privilege of parliament, by all his lands and chattels in your bailiwick, ſo that neither he, nor any one for him, do intermeddle therewith until you ſhall have other commands in that behalf from us; and that you anſwer us for the iſſues of the ſame, ſo that you have his body before us, on

next

next after to anſwer *William White* in a plea of (as the caſe is) to the ſaid *William* his damage of one hundred pounds, and have there then this writ. Witneſs, &c.

Stormont and *Way*.

In the *alias diſtringas* "as before we have commanded you."

Præcipe.

Middleſex. *Diſtringas* for *William White* againſt *Benjamin Black*, Eſq; (having privilege of parliament) caſe returnable on next, after .

A. B. attorney.

If the defendant does not appear in four days after the return of the *diſtringas*, the return muſt be got from the ſheriff, and an *alias*, &c. iſſued out.

But if the defendant appears he files common bail with the clerk of the bails.

If he has no goods whereby he can be diſtrained in the county where the *venue* is laid, a *nihil* muſt be returned on the firſt *diſtringas*, and a *teſtatum* iſſued into the county where the plaintiff intends to levy.

Teſtatum diſtringas.

George, &c. To the ſheriff of Kent, greeting: We command you that you diſtrain *Benjamin Black*, Eſq; having privilege of parliament, by all his lands and chattels, in your bailiwick, ſo that neither he nor any one for him do intermeddle therewith, until you ſhall have other commands in that behalf from us, and that you anſwer to us for the iſſues of the ſame, ſo that you have his body before us on next, after to anſwer to *William White*, of a plea of (as the caſe is), and for that our ſheriff of Middleſex, a certain day now paſt, returned that the ſaid *Benjamin* had not any thing in his bailiwick whereby he could cauſe him to be diſtrained, as by the ſaid writ he was commanded, whereupon it

is teſtified in our ſame court before us that the ſaid *Benjamin* hath ſufficient goods and chattels in your bailiwick whereby you can cauſe him to be diſtrained, and have there then this writ. Witneſs, &c.

When the defendant has appeared, the declaration is to be delivered as of the term the appearance is of, and if delivered four days excluſive before the end of the term, he muſt plead without imparlance. The declaration is ingroſſed on a treble penny ſtamped paper, and is a copy of the bill; a rule is to be given to plead as in other caſes.

The plaintiff in an action againſt a member, had proceeded agreeable to 10 *Geo.* 3. and obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*; and alſo for a rule for an attachment againſt the ſheriff, but no iſſues had been actually levied; at length defendant appeared; whereupon it was moved that theſe rules ſhould be diſcharged, for as no iſſues had been levied, they could not be ſold, and as the defendant in the action had now appeared, the end and purpoſe of the writs were anſwered. On the other ſide, the plaintiff inſiſted on the coſts of iſſuing the writs before the rules ſhould be diſcharged. And the court thought that reaſonable, and directed that on payment of coſts the rules ſhould be diſcharged. They were of opinion that theſe coſts were not to attend the event of the ſuit, but were to be paid to the plaintiff at all events, whether he ſhould finally ſucceed or not.

A peereſs by birth is entitled to privilege. 2 *Inſt.* 50. *Sty.* 222, 234, 252. *Fort.* 162. *Vent.* 298. *Eq. Ca. Abr.* 349. *Co. Lit.* 162. 6 *Rep.* 53. *b. Dy.* 79. *pl.* 5. *Ord Dom Proc.* 21. *Feby.* 1669.

Doubted whether a peereſs, by patent only for life, entitled to privilege, *Sty.* 234, 252. Held not, *Sty.* 254, but adjourned.

A peereſs by marriage is entitled to privilege, and that as well during coverture as after. But a peereſs by marriage loſes her dignity by marrying a commoner, and is not then intituled to any privilege. *Co. Lit.* 16. 6 *Co.* 5 3. *Dy.* 79.

I

It was holden by *Holt*, chief-juſtice, in the caſe of Lord *Banbury*, that where a perſon is called to the houſe of peers by writ, that he is not a peer, until he ſits in parliament; the writ not giving him nobility or honour; but that it was ſitting in the houſe of lords and aſſociating with them that enobled the blood; and therefore, that if the king, or the perſon dieth before the parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwiſe in creations by letters patent, by which act the party is immediately noble, without any other act or ceremony; and though the king dies, or the parliament never meets, the nobility remains to him and his poſterity, according to the limitations in the patent.

Motion for a *ſuperſedeas* to a *latitat* which had iſſued againſt Lord *Banbury*, by name of *Charles Knollys*, denied; and the chief juſtice ſaid, that they could not take notice that this *Charles Knollys* is earl of *Banbury*, and there was a difference between this caſe and the caſe of a peer that had ſat in the houſe. For if his lordſhip had ever been ſummoned to parliament, and had a writ to ſhew, and there was no diſpute about the identity of the perſon; they would have granted a *ſuperſedeas*. But in this caſe of a lord who has never ſat in the houſe they could not do it; for they could not try peerage on a motion; but that his lordſhip might plead it, and pray a *ſuperſedeas*. And *per Powell*, if in the writ he had been named peer, it would have been ſuperſeded. 1 *Vent.* 298. *Ld. Raym.* 127. *Salk.* 512.

If a commoner who has been held to ſpecial bail, move to be diſcharged upon common bail, the court will not grant a rule to ſhew cauſe upon affidavit only; but upon the attendance of the clerk of the crown, or deputy, with the ſheriff's return, they will then make the rule. *Fenwick* v. *Fenwick*, *Mich.* 2. *Geo.* 3. *Blackſt. Rep.* 788.

The courſe of the court is on motion, to order the whole of the debt to be levied on the *alias diſtringas*.

The plaintiff had obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias* and *pluries*, and alſo a rule for an attachment againſt the ſheriff, but no

no iſſues had been levied, and at laſt the defendant appeared, upon which it was moved, that all the rules ſhould be diſcharged; for as no iſſues had been levied they could not be ſold; and as the defendant had appeared, the purpoſe of the writs was anſwered. But the plaintiff inſiſted upon the coſts of the writs, before the rules ſhould be diſcharged, which the court thought reaſonable, and directed the rules to be diſcharged upon payment of coſts; being of opinion, that theſe coſts ought not to attend the event of the ſuit, but were to be paid to the plaintiff, whether he ſhould finally ſucceed or not *Martin* v. *Townſend and Sawbridge*, *Burr. Rep.* 4 *pt.* 2725.

It ſeemeth, however ſtrange, that a plaintiff ſhould be entitled to any expences from whatever cauſe they may have ariſen, which he hath ſuſtained in endeavouring to inforce an unjuſt demand.

A bill of Middleſex iſſued againſt the counteſs of Huntingdon was diſcharged by *ſuperſedeas*, without pleading; it appearing by the record that ſhe was a peereſs, and the attorney was committed for ſuing out the proceſs. *Vent.* 298.

Motion to ſet aſide a *diſtringas* iſſued againſt *Lord Byron* by bill; precedents being ſearched, it was found the uniform practice in *B. R.* to proceed againſt peers in that court by bill of privilege, before the ſtatute, 12 & 13 *W.* 3. and as that act made no difference in that reſpect, held, that the juriſdiction of the court remained as before.

An action was commenced againſt *Lord Weymouth* by bill of privilege; plea in abatement, that he ought to have been ſued by original writ, and not by bill of privilege, demurrer, and joinder. On argument, the court relied upon the caſe of *Say* and *Lord Byron*, and awarded a *reſpondeas ouſter*.

On a judgment obtained upon a *ſtatute ſtaple*, or *ſtatute merchant*, or upon the ſtatute of *Acton Burnell*, 11 *Ed.* 1. a *capias ad ſatisfaciendum* lies even againſt a peer of the realm.

By the 10 *Geo.* 3. *c.* 50. it is enacted, that any perſon or perſons ſhall or may at any time commence and proſecute any action or ſuit in any court of record

cord or court of equity, or of admiralty; and in all cases matrimonial and testamentary, in any court, having cognizance of cause, matrimonial and testamentary against any peer or lord of parliament of Great Britain, or against any of the knights, citizens, or burgesses, and the commissioners for shires and burghs of the house of commons of Great Britain for the time being; or against their or any of their menial or other servants, or any other person entitled to privilege of parliament of Great Britain; and no such action, suit, or any other process of proceeding hereupon, shall, at any time, be impeached, stayed or delayed, by or under colour of any privilege of parliament.

But nothing in this act shall extend to subject the person of any of the knights, citizens, and burgesses, or the commissioners, for shires and burghs for the time being, to be arrested or imprisoned upon any such suit or proceeding.

That the court out of which the writ of *distringas* proceeds may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the court shall think just, under all the circumstances to order, and the surplus to be returned until the defendant shall have appeared or other purpose of the writ be answered.

That when the purpose of the writ be answered the said issues shall be returned; or if sold what shall remain of the money arising from such sale repaid to the party distrained.

That obedience may be enforced to any rule of his majesty's court of king's bench, common pleas, or exchequer, against any person entitled to privilege of parliament by distress infinite, in case any person or persons entitled to the benefit of such rule do chuse to proceed in this manner.

The only way in which the courts could anciently take cognizance of privilege of parliament, was by writ of privilege in the nature of a *supersedeas* to deliver the party out of custody; for when a letter was written

written by the ſpeaker to the judges to ſtay proceedings againſt a privileged perſon, they rejected it as contrary to their oath.

But ſince the 12 *W.* 3. which enacts that no privileged perſon ſhall be ſubject to arreſt or impriſonment, it is held that ſuch arreſt is void *ab initio*; and that the party may be diſcharged upon motion.

The privilege of parliament doth not extend to treaſon, felony, breach, or ſurety of the peace. 4 *Inſt.* 25. *Hawk. Pl. Cr.* 4. 24.

Chap. XXXIII.

Of proceedings by and againſt corporations.

A Corporation muſt ſue in its name of the corporation, and by an attorney appointed under the ſeal of the corporation. *Bro. Corp.* 28.

A corporation muſt be ſued by the name of incorporation by original writ. A *præcipe* muſt be therefore made out for an original writ, which muſt be made out by the cuſtos of the proper county and duly filed with the filazer, on which a ſummons is to be made out, containing the whole cauſe of action, upon which, if they appear, the proceedings as in other caſes.

If they do not appear upon the ſummons at the return of the original writ, the plaintiff muſt take out a *diſtringas*, and proceed againſt them by diſtreſs infinite; and it is not ſufficient, if the perſons diſtrained, or all the members of the corporation appear in perſon at the return of the proceſs, but they muſt appear by an attorney appointed under ſeal.

If the ſheriff returns but ſmall iſſues on the *diſtringas*, the court will, on motion, order them to be increaſed.

A corporation cannot be eſſoigned. *Dalt.* 12 *pl.* 154.

A corporation cannot be outlawed. 12 *Co.* 326

An attachment does not lie againſt a corporation

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A corporation muſt not be declared againſt as being in cuſtody of the marſhal. 6 *Mod.* 183.

A corporation cannot ſue as a common informer. 2 *Stra* 1241.

Treſpaſs does not lie againſt a corporation aggregate, for outlawry does not lie againſt them, and a *capias* and exigent do not go. *Bro. Corp.* 43.

Replevin does not lie againſt an aggregate corporation by the name of incorporation, for they cannot diſtrain in their own perſons but by their bailiff. *Brownl.* 175

Corporations cannot ſue without their head, or in the time of vacation of their headſhip. *Wood's Inſt.* 116.

Corporations aggregate cannot commit treaſon, or be outlawed, nor (becauſe, as is gravely obſerved by lord Coke, a corporation hath no ſoul) be excommunicated. 10 *Rep.* 32. 1 *Rep.* 127. 1 *Inſt.* 134. *a.*

Corporations cannot be executors or adminiſtrators. *Ibid.*

Corporations cannot be joint-tenants to take by ſurvivorſhip (as in that caſe the corporation never dying, would be ſure of the eſtate) but they may be tenants in common. *Wood's Inſt.* 110.

A corporation cannot be ſeized to the uſe of another. *Ibid.*

In an action againſt the Eaſt-India company for five thouſand pounds, it was moved, that the ſheriff might return exemplary iſſues, as ſeveral writs of *diſtringas* had been ſerved to no purpoſe, and the court ſaid he ſhould return good iſſues; and that if he did not, the plaintiff might bring an action againſt him, and he was ordered to attend. *Salk.* 191. p. 2.

The members cannot be witneſſes for the corporation, 2 *Lev.* 232. 236. *Str.* 1069.

Ejectment on the demiſe of a corporation aggregate, the verdict was for the plaintiff, and error brought; it was objected that the demiſe is not ſet forth to be by deed; but the judgment was affirmed, for the demiſe is confeſſed to be good by confeſſing leaſe, entry and ouſter. 12 *Mod.* 113.

In ejectment in *C. B.* the plaintiff declared upon a demiſe to him by the aldermen and burgeſſes of Bury St. Edmund, in the county of Suffolk, and did not ſet forth that it was by deed, or under ſeal of the corporation, upon not guilty pleaded, plaintiff had a verdict and judgment; and error was brought in *B. R.* and the error inſiſted on was, that this demiſe was void, becauſe a corporation aggregate can do nothing but by deed under their common ſeal; and the caſe of 2 *Cro.* 613. was cited as parallel, for that was an ejectment for tithes, and a verdict for the plaintiff; but the judgment was arreſted, becauſe the plaintiff had not declared upon a demiſe by deed, for tithes will not paſs without a deed, *Sed per Cur.* Since that caſe in 2 *Cro.* the law is altered as to this point concerning declarations in ejectment, for now they are grounded on fictions only. Judgment affirmed. *Patrick* againſt *Ball*, *Carth.* 390.

The bailiff and burgeſſes of Eaſt Retford were ſued in their corporate capacity, in *C. B.* by a common *capias ad reſpondendum*, and upon affidavit of ſervice, an appearance was entered by the plaintiff according to the ſtatute and a declaration entered in the office, reciting that the defendants were attached (which cannot be). The defendants moved to ſet aſide the proceedings, objecting that they ought to be ſued by *pone* and *diſtringas*. The court was of opinion that as the defendants were ſued in their corporate capacity, the *capias ad reſpondendum* was void, and the rule was made abſolute; but it was agreed, that had the defendants themſelves appeared, the objection had been waived. *Langley* v. *Bailiffs and Burgeſſes of Eaſt Retford*, *Barnes.* 415.

Chap. XXXIV.

Of proceedings againſt Hundredors.

THE proceedings againſt hundredors in caſe of robbery, are founded upon the ſtatutes. An *hue*, from *huer* to ſhout, and cry, *hutesium et clamor*, is the old common law proceſs of purſuing felons. *Bracton*, *l* 3. *tr.* 2. *c.* 1. *f.* 1. *Mir. c.* 2. *f.* 6.

The principal ſtatute relative hereto is the ſtatute of *Winton*, 13 *Ed.* 1. *c.* 1 & 4. which directs that from thenceforth every country ſhall be ſo well kept, that immediately upon felonies and robberies committed, freſh ſuit ſhall be made from town to town, and from county to county, and they that keep the town, ſhall follow with hue and cry with all the town and towns, near, and ſo hue and cry ſhall be made from town to town, and from county to county, until they ſhall be taken and delivered to the ſheriff, and that ſuch hue and cry may be the more effectually made; the hundred is bound by the ſame ſtatute to anſwer for all robberies committed therein, unleſs they take the felon.

This ſtatute hath been explained and enforced by divers ſubſequent ſtatutes, *viz.* 27 Eliz. *c.* 13. 29 Car. 2. c. 7. 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

Theſe ſtatutes direct the proceedings of the perſon robbed, in order to enable him to recover his loſs from the hundred, in which the robbery was committed; the principal of which are, that he make hue and cry; give ſuch notice of the robbery as directed; deſcribing the robbers, and the time and place when the robbery was committed; cauſe notice thereof to be given, deſcribing the robbers and robbery in the London Gazette; enter into bond before the ſheriff to the high conſtable of the hundred, for the ſecurity of the coſts, on being nonſuited, &c. and that twenty days before the iſſuing the writ, he make oath be-

fore a juſtice, that he did not know the robbers, and that the hundred have not taken the robbers.

No proceſs for appearance in any action to be brought upon the ſtatutes of hue and cry, or either of them againſt any hundred ſhall be ſerved upon any inhabitant thereof, ſave only upon the high conſtable, or conſtables of the hundred wherein the robbery ſhall happen, who is required to cauſe public notice thereof to be given in one of the principal market towns within ſuch hundred, on the next market day, after he or they ſhall be ſerved with ſuch proceſs; or if there ſhall happen to be no market town within the hundred, then in ſome pariſh church within the ſame hundred, immediately after divine ſervice, on the Sunday next after his or their being ſerved with ſuch proceſs, and he and they is and are (by this act) impowered and required to enter, or cauſe to be entered an appearance in ſuch action; and alſo defend the ſame, for and on behalf of the inhabitants of the hundred, as he or they ſhall be adviſed. *Stat.* 8 *Geo.* 2. *c.* 16.

The proceſs muſt be by original (a copy of which is to be ſerved) for the inhabitants of an hundred cannot be in the cuſtody of the marſhal. 3 *Keb.* 26. 2 *Saund.* 357. 4 *Mod.* 296.

The original writ on the *ſtat.* 13 *Ed.* 1. muſt be teſted forty days after the robbery (which time is allowed the hundred to take the robbers by the ſtatute) and within a year. *Brownl.* 156.

The writ uſually recites the ſtatute. *Thr. Br.* 141. *Saund.* 372. 4 *Mod.* 296. But the recital of the ſtatute is not neceſſary, but it muſt ſet forth the circumſtances of the robbery the plaintiff's compliance with the directions of the ſtatutes.

The declaration muſt be againſt the inhabitants of the hundred generally; for if it is againſt any by name, and all are not named, it is bad. *R.* 2. *Keb.* 126.

The declaration doth not need to recite the original at large, *Mills* 26. nor more of the ſtatute than is pertinent to the action, 2 *Vent.* 215. And muſt conclude *contra formam ſtatuti*; that is, the ſtatute of Winton; for *contra formam ſtatutorum* is bad. *Yelv.* 116.

If the defendants plead, and there is an iſſue, the *venire* ſhall be awarded *de corpore comitatus*, (except the hundred againſt which the action is brought). 24 *Geo.* 2. *c.* 18. *ſ.* 3.

And if judgment be againſt them, execution is not to be levied on any particular inhabitant, nor on the high conſtable; but to be left with the ſheriff, who is to ſhew the writ to two juſtices, who are to raiſe the money by aſſeſſment under the ſtat. 27 *Eliz. c.* 13. and no ſheriff ſhall be called on to return his writ, until after the expiration of 60 days after delivery to him, and at the ſame time the conſtable to have his coſts taxed and levied. 8 *Geo.* 2. *c.* 16.

No writ of execution hereafter to be ſued out againſt any of the inhabitants of any hundred, or any judgment obtained by virtue of any act or acts of parliament, ſhall be levied on any particular inhabitant, but the ſheriff ſhall, on receipt of ſuch writ, cauſe the ſame to be produced before two juſtices, and proceed in the ſame manner as by 8 *Geo.* 2. *c.* 16. *ſtat.* 22 *Geo.* 2. *c.* 4. *b. ſ.* 34.

If an action be brought againſt two of the inhabitants upon the 1 *Geo.* 2. *c.* 5. for demoliſhing or burning houſes, the execution muſt not be levied againſt them, but left with the ſheriff, and he is to proceed in the ſame manner as under the 8 *Geo.* 2. *c.* 16. for levying the ſame.

Of a like nature is the action given by the ſtatute, 9 *Geo.* 1. *c.* 22. commonly called the *black act* againſt the inhabitants of any hundred, to make ſatisfaction in damages to all perſons who have ſuffered by the offences enumerated in that act.

Chap. XXXV.

Of proceedings in the caſe of bankrupts.

A Bankrupt is a trader who ſecretes himſelf, or doth certain other acts tending to defraud his creditors. The offence (as it is called by Sir *Ed. Coke*, 14 *Inſt.*

4 *Inſt.* 277.) of bankruptcy is totally unknown at common law; and the firſt ſtatute concerning bankruptcy was 34 *Hen.* 8. *c.* 4. which has been almoſt totally altered by 13 *Eliz. c.* 7. by which bankruptcy is confined to ſuch perſons only as have uſed the trade of merchandize in groſs, or by retail by way of bargaining, exchange, rechange, bartering, cheviſance (that is, making contracts) or otherwiſe, or have ſought their living by buying and ſelling; perſons uſing the trade and profeſſion of a ſcrivener, receiving other mens monies into their cuſtody, are alſo liable to be bankrupts by *ſtat.* 21 *Jac.* 1. *c.* 19. as alſo are by the ſame ſtatute aliens and denizens, as well as natural born ſubjects; and by many other ſtatutes, and laſtly by the ſtatute 5 *Geo.* 2. *c.* 30. bankers, brokers, and factors are declared to be within the operation of the bankrupt-laws; but by the ſame act no farmer, grazier, or drover is (as ſuch, for they are often bankrupts under the deſcription of dealers and chapmen) liable to be deemed a bankrupt; nor is a receiver of the king's taxes, capable (as ſuch) by the ſame ſtatute to be made a bankrupt; and no perſon ſhall have a commiſſion of bankrupt awarded againſt him, but at the petition of ſome one creditor to whom he owes one hundred pounds, of two to whom he owes one hundred and fifty pounds, or of more to whom he is indebted two hundred pounds.

In the conſtruction of the bankrupt-laws, it has been held, that buying only, or ſelling only, will not bring a perſon within their operation; but that it muſt be ſeeking a livelihood by buying and ſelling.

That an huſbandman, gardener, and the like, who are paid for their work and labour, are not within the ſtatutes. *Cro. Car.* 31.

That an inn-keeper (as ſuch) cannot be a bankrupt, for his gain doth not ariſe from buying and ſelling by way of merchandize; but in great part from the uſe of his rooms and furniture; for though he buy corn and victuals to ſell again at a profit, yet that doth not make him a trader. *Cro. Car.* 549. *Skinner* 291.

Nor

Nor a ſchool-maſter or other perſon who keeps a boarding houſe, and makes conſiderable gains by buying and ſelling what he ſpends in the houſe. *Skin.* 291. 3 *Mod.* 330.

But thoſe who buy goods and make them up into ſaleable commodities, ſuch as ſhoemakers, ſmiths, and the like, although part of the gain be by bodily labour, yet as that labour is only in melioration of the commodity, are held to be within the ſtatute. *Cro. Car.* 31. *Skin.* 292.

No perſon is eſteemed a trader from one particular inſtance of buying and ſelling; but there muſt be a repeated practice in the view of profit.

Nor buying and ſelling bank ſtock, or government ſecurities. 2 *P. Wms.* 308.

And the ſtatutes in general concerning companies trading on joint ſtocks, provide, that the members of ſuch companies ſhall not in that reſpect be liable to be bankrupts.

An infant trader cannot be a bankrupt; nor can any perſon be bankrupt for debts which is not liable at law to pay. *Lord Raym.* 440.

But a feme covert in London, being a ſole trader, according to the cuſtom, may be a bankrupt. *La Vie* v. *Philips, M.* 6 *Geo.* 3. *B. R.*

Amongſt acts of bankruptcy are, departing the realm, 13 *Eliz. c.* 7. Departing a man's own houſe. *Ibid.* 1 *Jac. c.* 15. Keeping houſe, 13 *Eliz. c.* 7. With intent to defraud creditors. Procuring oneſelf to be arreſted, outlawed, or impriſoned, without juſt cauſe, which is conſtrued to have the ſame intent. *Ibid.* 1 *Jac. c.* 15. Procuring ones money, goods, chattels, or effects, to be attached or ſequeſtered by any legal proceſs, 1 *Jac. c.* 15. Any fraudulent conveyance of ones lands, goods, or chattels, *Ibid.* Procuring any protection from arreſts, not having oneſelf privilege of parliament, 21 *Jac.* 1. *c.* 19. Endeavouring by any petition to the king, or bill in any of the king's courts, to compel creditors to take leſs than, or to procraſtinate the payment of a juſt debt, *Ibid.* this is however an act of bankruptcy, which can hardly be committed in theſe times,

times, as ſuch bills and petitions are not now in uſe. Lying in priſon two months, or upwards, on arreſt for debt, *Ibid.* Eſcaping from priſon after an arreſt for a juſt debt of one hundred pounds or upwards. 21 *Jac.* 1. *c.* 19. Any trader having privilege of parliament, neglecting to make ſatisfaction for any juſt debt of one hundred pounds and upwards, within two months after ſervice of legal proceſs. 4 *Geo.* 3. *c.* 33.

The commiſſion iſſues out of the court of chancery; and certain commiſſioners appointed by that court adjudge whether the party againſt whom the commiſſion is awarded is an object of the bankrupt-laws; but the deciſion of thoſe commiſſioners may be traverſed either by the party himſelf, or by any other perſon having intereſt in the queſtion, and the fact muſt then be decided by a jury in the courts of law.

After payment of fifteen ſhillings in the pound, in caſe a bankrupt ſhall be afterwards arreſted for any debt due before ſuch time, as he, ſhe, or they became bankrupt, he ſhall be diſcharged upon common bail, and may plead "that the cauſe of ſuch action or ſuit did accrue before ſuch time as he, ſhe, or they became bankrupts;" and the certificate of ſuch bankrupt's conforming, and the allowance thereof ſhall be ſufficient evidence of the trading. 5 *Geo.* 2. *c.* 30. *ſ.* 7.

If any bankrupt who ſhall have obtained his or her certificate from the acting commiſſioners, and ſuch certificate be allowed and confirmed as directed, ſhall be taken in execution or detained in priſon on account of any debts, due or owing before he or ſhe become bankrupt, by reaſon that judgment was obtained before ſuch certificate was allowed and confirmed, it ſhall and may be lawful, for any one or more of the judges of the court, wherein judgment has been ſo obtained againſt ſuch bankrupt, on ſuch bankrupt's producing his or her certificate, allowed and confirmed, to order any ſheriff or ſheriffs, bailiff, or officer, gaoler or keeper of any priſon, who hath or ſhall have any ſuch bankrupt in his cuſtody, by

virtue

virtue of any ſuch execution, to diſcharge ſuch bankrupt out of cuſtody on ſuch execution, without payment of any fee or reward, and ſuch ſheriff, &c. is, and are hereby required to diſcharge ſuch bankrupt out of cuſtody accordingly, and is indemnified from any action for an eſcape for ſo doing. *Ibid. ſ.* 13.

If the bankrupt is in cuſtody before the certificate is allowed, application muſt be made to a judge at his chambers, for a ſummons, to ſhew cauſe why the bankrupt ſhould not be diſcharged, having obtained a certificate; which upon producing, and an affidavit (if the attorney does not attend for the plaintiff) of the debt having accrued before the party became a bankrupt, the judge will grant an order for the diſcharge upon the third ſummons.

But if the bankrupt be in cuſtody at the ſuit of the king, on an extent, he cannot be diſcharged therefrom. 1 *Atk.* 220

A bankrupt was taken upon an attachment, for not performing an award; after which he became a bankrupt, and obtained his certificate, and upon motion for his diſcharge, it was oppoſed, becauſe the bankruptcy does not purge a contempt; but the court held, that this was a demand for which an action of debt will lie; and the act ſays, he ſhall not be arreſted, &c. for any debt due before the bankruptcy. It would be hard to keep him in cuſtody, when the duty is diſcharged; and therefore he was diſcharged. 2 *Str.* 1152.

On motion to diſcharge a bankrupt out of execution on the *ſtat.* 5 *Geo.* 2. *c.* 30. it appeared, that the debt was contracted before the bankruptcy, and ſued for and recovered pending the commiſſion, and before any certificate obtained; and the judgment was afterwards affirmed on error, and coſts given on ſuch affirmance. The court diſcharged him as to all; for not having his certificate, he could not plead it to the action: and theſe coſts were attendant upon the original judgment, and cannot be conſidered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought. 2 *Stra.* 1196.

Notwithſtanding a bankrupt cannot be diſcharged out of cuſtody upon an arreſt, before his certificate is allowed, yet if the creditor prove his debt under the commiſſion, the defendant may, by petition, apply to the court of chancery for him to elect, whether he will proceed at law, or take his debt under the commiſſion; and though he does make his election to proceed at law, yet he may aſſent to, or diſſent from the certificate. 1 *Atkins* 220.

Petition for a creditor to make his election whether he will proceed at law, or come in under a commiſſion.

In the matter of *Benjamin Black*, a bankrupt. In chancery.

To the right honourable the lord high chancellor of Great Britain.

The humble petition of the ſaid bankrupt,

Sheweth,

That a commiſſion of bankrupt on the day of 1784, was iſſued under the great ſeal of Great Britain, againſt your petitioner, directed to *A. B. C. D. E. F.* and *G. H.* eſquires, and *J. K.* gentleman.

That *William White*, of in the county of , gentleman, a creditor of your petitioner, did prove at one of the meetings under the ſaid commiſſion, a debt due to him from your petitioner, to the amount of one hundred pounds,

That the ſaid *William White* lately ſued out of his majeſty's court of king's bench againſt your petitioner, a writ of (as the caſe is) returnable on and cauſed your petitioner to be arreſted for the ſaid ſum of one hundred pounds ſo proved under the ſaid commiſſion,

"Your petitioner therefore moſt humbly pray your lordſhip, to order the ſaid *William White* forthwith to make his election; either ſolely to

to proceed at law againſt your petitioner, or take his ſaid debt under the ſaid commiſſion, and that in caſe he ſhould elect to take the ſaid debt under the ſaid commiſſion, that then your lordſhip will be pleaſed to order the ſaid *William White*, to releaſe your petitioner from the ſaid action, at his own coſts and charges; or that your lordſhip will be pleaſed to grant your petitioner ſuch other relief in the premiſes as to your lordſhip may ſeem meet.

And your petitioner ſhall ever pray, &c."

This petition is to be ingroſſed on a treble ſixpenny ſtamp paper, and left at the bankrupt's office, Clement's inn, with a fair copy for the chancellor upon plain paper. A copy of the petition with the chancellor's order for attendance thereon is to be ſerved on the plaintiff or his attorney, and an affidavit made of ſuch ſervice, and the defendant ſhould alſo make affidavit that the plaintiff has proved the debt uuder the commiſſion, and that he does not ſtand indebted to him in any other ſum. Upon the hearing of the petition, the ſolicitor under the commiſſion muſt attend with the proceedings; for which he is paid 20*s*.

In July the bail were fixed, and the money levied by the ſheriff, and paid to him: the bankrupt obtained his certificate in Auguſt following. *Qu.* Whether the bail were become abſolutely liable; and conſequently the certificate came too late to help them? *Cur.* If the certificate is obtained before the bail are fixed, they ſhall be diſcharged; but if they are fixed before the certificate is obtained, they remain liable. *Woolley* v. *Cobbe*, 1 *Burr.* 244.

But if an action is brought upon a bail bond againſt the bankrupt himſelf, though he is diſcharged from the original debt by his certificate, yet he is not from this, for the court ſaid, that this was a new debt, and diſtinct cauſe of action, and therefore refuſed to relieve the bankrupt, and ordered the ſheriff to pay the money to the plaintiff. *Cockerill* v. *Owſton*, *Ibid.* 436.

Notwithſtanding a bankrupt cannot he diſcharged out of cuſtody upon an arreſt, before his certificate is allowed, yet if the creditor prove his debt under the commiſſion, the defendant may, by petition, apply to the court of chancery for him to elect, whether he will proceed at law, or take his debt under the commiſſion; and though he does make his election to proceed at law, yet he may aſſent to, or diſſent from the certificate. 1 *Atkins* 220.

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That the ſaid *William White* lately ſued out of his majeſty's court of king's bench againſt your petitioner, a writ of (as the caſe is) returnable on and cauſed your petitioner to be arreſted for the ſaid ſum of one hundred pounds ſo proved under the ſaid commiſſion,

"Your petitioner therefore moſt humbly pray your lordſhip, to order the ſaid *William White* forthwith to make his election; either ſolely to

to proceed at law againſt your petitioner, or take his ſaid debt under the ſaid commiſſion, and that in caſe he ſhould elect to take the ſaid debt under the ſaid commiſſion, that then your lordſhip will be pleaſed to order the ſaid *William White*, to releaſe your petitioner from the ſaid action, at his own coſts and charges; or that your lordſhip will be pleaſed to grant your petitioner ſuch other relief in the premiſes as to your lordſhip may ſeem meet.

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In July the bail were fixed, and the money levied by the ſheriff, and paid to him: the bankrupt obtained his certificate in Auguſt following. *Qu.* Whether the bail were become abſolutely liable; and conſequently the certificate came too late to help them? *Cur.* If the certificate is obtained before the bail are fixed, they ſhall be diſcharged; but if they are fixed before the certificate is obtained, they remain liable. *Woolley* v. *Cobbe*, 1 *Burr.* 244.

But if an action is brought upon a bail bond againſt the bankrupt himſelf, though he is diſcharged from the original debt by his certificate, yet he is not from this, for the court ſaid, that this was a new debt, and diſtinct cauſe of action, and therefore refuſed to relieve the bankrupt, and ordered the ſheriff to pay the money to the plaintiff. *Cockerill* v. *Owſton*, *Ibid.* 436.

But the certificate ſhall diſcharge proceedings depending againſt bail, in an action upon the old debt, who are not already fixed. *Ibid.*

A bankrupt being ſued as an executor, pleaded a falſe plea, which being found againſt him, the plaintiff had judgment *de bonis propriis* for the coſts; after which he obtained his certificate. *Cur.* The pleading a falſe plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for coſts, was ſingly owing to his falſe plea, which was ſubſequent to the iſſuing of the commiſſion; conſequently could not have been proved under the commiſſion, and therefore cannot be diſcharged by the certificate. *Howard* v. *Jemmet*, 3 *Burr.* 1368.

If an executor becomes bankrupt, the commiſſioners cannot ſeize the ſpecific effects of his teſtator; not even money which ſpecifically can be diſtinguiſhed and aſcertained to belong to ſuch teſtator, and not to the bankrupt himſelf. *Ibid.* 1369.

The defendant, 9 May, 1734, was bail in error, 25 October following he committed an act of bankruptcy, and after got his certificate. On 12 November judgment affirmed; and to an action on the recognizance he pleaded his certificate, and held he was not diſcharged; for it was a contingent debt, for which plaintiff could not come in under the commiſſion; the ſtatute of 7 *Geo.* 1. *c.* 51. only letting in thoſe where the payment was certain, though future. 2 *Str.* 1043.

No debt can be barred but what was a debt contracted, with certainty, before the act of bankruptcy. 3 *Wilſ.* 17.

If *A.* enters into a bond to *B.* for the payment of an annuity, and he becomes bankrupt, and obtains his certificate, and there is a payment due before the bankruptcy; if *B.* arreſts *A.* for arrears, the court will diſcharge *A.* upon common bail; for the penalty of the bond once becoming forfeited, is a debt that might be proved under the commiſſion; therefore the certificate will bar the plaintiff of his future demand. *Hodges* v. *Remnant*, *B. R. Eaſter Term*, 1779.

B

But if the penalty of the bond had never been forfeited, by the annuity being in arrear, it would have been otherwiſe.

Chap. XXXVI.

Of proceeding in the caſe of paupers.

BY the ſtatute 11 *Hen.* 7. *c.* 12. it is enacted in the following words: Prayen, "The commons in this preſent parliament aſſembled, that where the king our ſovereign lord of his moſt gracious diſpoſition, willeth and intendeth indifferent juſtice, to be had and miniſtred according to his common laws, to all his true ſubjects" "as well to the poor as rich," "which poor ſubjects be not of ability nor power to ſue according to the laws of this land, for the redreſs of injuries and wrongs to them daily done, as well concerning their perſons and their inheritance as other cauſes; for remedy whereof, on behalf of the poor perſons of this land, not able to ſue for their remedy after the courſe of the common law, be it ordained and enacted, that every poor perſon or perſons, which have or hereafter ſhall have cauſe of action, &c. ſhall have original writs, &c. nothing taking for the ſame, counſel, attornies, and all other officers requiſite and neceſſary for the ſpeed of the ſaid ſuits to be had and made, which ſhall do their duties, without any reward for their counſels, help, and buſineſs in the ſame."

And by the ſtatute 23 *Hen.* 8. *c.* 15. paupers, when plaintiffs, are excuſed from paying coſts; but ſhall ſuffer other puniſhment at the diſcretion of the judges: and it was formerly the uſage to give paupers, plaintiffs, if non-ſuited, their election either to be whipped or pay coſts, 1 *Sid.* 261. 7 *Mod.* 114. but that practice is now diſuſed, *Salk.* 506. And indeed it has been obſerved, that the court hath no officer for that purpoſe.

A pauper

A pauper may however recover coſts, although he doth pay any; for the counſel and clerks are bound to give their labour to him, but not to the other party. 1 *Eq. Caſ. Abr.* 125.

It is not ſettled by the *ſtat.* 11. *Hen.* 7. *c.* 12. how much the poor perſon is to be worth, but the courts of juſtice have fixed the ſum to be under five pounds, (excepting wearing apparel, and his right to the matter in queſtion). *Lil. Prac. Reg.* 633.

If therefore the plaintiff is in ſuch circumſtances, he muſt petition to one of the judges of this court to be admitted to ſue in *forma pauperis*, and if he has begun the ſuit, and not able to proceed in the ſame, he may ſtill petition to be admitted to ſue, as a pauper. The petition is to be ingroſſed on a treble 6*d.* ſtamped paper, and there is to be annexed to it an affidavit of the plaintiff's circumſtances on the like ſtamp, which are to be taken to a judge at chambers, and after oath is made thereof, the clerk will make out an order thereon, paying him 12*s.*

Petition.

William White, plaintiff,
In the king's bench. and
Benjamin Black, defendant.

To the right honourable *William* earl Mansfield, lord chief juſtice of his majeſty's court of king's bench,

The humble petition of *William White*.

Sheweth,

That the ſaid defendant is and ſtands juſtly indebted unto your petitioner in the ſum of fifty pounds (ſtating the cauſe of action) and your petitioner hath commenced an action againſt him for the ſame.

(Or, "and your petitioner hath not as yet commenced any action againſt him being unable, &c.")

That your petitioner finds himſelf unable to carry on the ſaid cauſe, on account of his extreme poverty, as appears by the affidavit hereto annexed.

"Your

" Your petitioner therefore moſt humbly prays your lordſhip that he may be admitted in *forma pauperis*, to proſecute his ſaid action, and that *E. F.* eſq; may be aſſigned to him as his counſel, and *A. B.* his attorney to proſecute his ſaid ſuit.

And your petitioner ſhall ever pray, &c.

Affidavit.

William White,
In the king's bench, againſt
Benjamin Black.

William White, of, &c. yeoman, maketh oath and ſaith, that he is not worth five pounds in all the world, ſave and except the matters in queſtion in this cauſe, and alſo his wearing apparel.

In order to prevent the pauper inſtituting frivolous or vexatious ſuits, every petition to be admitted to ſue in *forma pauperis* muſt have a certificate from counſel of the apparent juſtice of the petitioner's cauſe, which is generally written in the margin of the petition in the following words:

Certificate.

" I humbly conceive that the ſaid petitioner hath good cauſe of action againſt the ſaid *Benjamin Black*, and humbly accept to be his counſel.

E. F."

The pauper, upon the order being made, may ſue out his writ without ſtamps, and payeth nothing through all the cauſe, for fees to any of the officers; if defendant pleads a ſpecial plea, on producing the petition and order to the clerk of the papers, he will make up the paper book *gratis*, no ſtamps are uſed for the record, *venire*, or *diſtringas*, nor is any thing paid for ſetting down the cauſe, or return of *diſtringas*.

But if the pauper recovers a verdict for above five pounds, the officers take the court fees, and in them they include paſſing the record, &c. the

the pauper being by them deemed *dives*. The declaration is in the common form, to which is to be annexed a copy of the petition, order, and affidavit, and delivered to the defendant's attorney. If the defendant brings error, the clerk of the error is paid his fees.

The plaintiff may, at any time pending the suit, petition to prosecute in *forma pauperis*.

If the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not afterwards be admitted again in that suit to prosecute in *forma pauperis*.

A pauper is not liable to pay the costs for judgment, as in the case of a nonsuit. 3 *Wils.* 24.

Nor to pay the costs before he brings a new action, if it does not appear that he has been vexatious. *Str.* 878.

If a pauper has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. *Ibid.* 983.

A person admitted *in forma pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted again *de novo et sic toties quoties*. Lil. Reg. 733.

Although the statute of 11 *H.* 7. admits poor persons to prosecute, yet it has not provided for poor defendants to defend, nor does the statute of 23 *H.* 8 except them from paying costs: but the statute of 2 *Geo.* 2. *c.* 8. *s.* 8. enacts, "that in case any person arrested or imprisoned by virtue of any writ of *capias* or information, relating to the customs, shall make affidavit that he is not worth five pound over and above his wearing apparel, such person shall petition to defend *in forma pauperis*, and have appointed an attorney and counsel in the same manner as poor plaintiffs."

Print

Petition to defend in forma pauperis.

In the king's bench. *William White*, plaintiff,
and
Benjamin Black, defendant,

To the right honourable *William* earl Mansfield, lord chief juſtice of his majeſty's court of king's bench.

Sheweth,

That the plaintiff hath lately commenced an action againſt your petitioner for (as the action is) and hath declared therein.

That your petitioner hath not as yet appeared thereto, and humbly conceives that he has a good defence to make to the ſaid action, but in regard that your petitioner is unable to carry on the ſame on account of his extreme poverty, as appears by the affidavit hereto annexed.

"Your petitioner therefore prays your lordſhip. that he may be admitted to defend the ſaid action in *forma pauperis*, and that *E. F.* Eſq; may be aſſigned to him as his counſel, and Mr. *C. D.* as his attorney, to defend his ſaid ſuit.

And your petitioner ſhall ever pray, &c."

To this petition muſt alſo be annexed a certificate from counſel, that the defendant appears to have a good cauſe of defence.

Certificate.

"I humbly conceive that the petitioner hath a good cauſe of defence, and humbly accept to be of his counſel.

E. F."

The affidavit is to be to the ſame purport as that of a pauper plaintiff, and a judge's order muſt be in like manner obtained thereon, and for which the ſame is paid, and a copy muſt be ſerved on the attorney for the plaintiff; but common bail muſt be filed on the proper ſtamp and the fee paid.

Chap. XXXVII.

Of proceedings in the caſe of priſoners.

GREAT circumſpection is neceſſary in proceedings againſt priſoners, as the ſmalleſt omiſſion or irregularity in the courſe of ſuch proceedings will deprive the client of the cuſtody of the priſoner, and the attorney is liable to make ſatisfaction to his client in ſuch caſes.

When a defendant was formerly arreſted upon *meſne proceſs*, and was for want of bail committed to goal, unleſs the plaintiff before the end of two terms, after the arreſt, cauſed the defendant to be brought into court by writ of *habeas corpus* in order to be committed to the cuſtody of the marſhal to be charged with a declaration, ſuch priſoner was diſcharged upon appearing by attorney or filing common bail.

By the ſtatute 4 & 5 *W. & M. c.* 21. *ſ.* 2 & 3. It is enacted, "That where any defendant or defendants be taken or charged in cuſtody, at the ſuit of any perſon or perſons, upon any writ or writs, out of any of the courts at Weſtminſter, and impriſoned, or detained in priſon, for want of ſureties for their appearance to the ſame, the plaintiff or plaintiffs, in ſuch writ or writs, ſhall and may by virtue of this act, before the end of the next term after ſuch writ or proceſs ſhall be returnable, declare againſt ſuch priſoner or priſoners in the reſpective court or courts, out of which the writ or writs ſhall iſſue, whereupon the ſaid priſoner or priſoner ſhall be taken and impriſoned, or charged in cuſtody; and ſhall and may cauſe a true copy thereof to be delivered to ſuch priſoner or priſoners, or the gaoler or keeper of the priſon, or gaol, in whoſe cuſtody ſuch priſoner ſhall be or remain; to which declaration or declarations the ſaid priſoner or priſoners ſhall appear and plead; and if ſuch priſoner or priſoners ſhall not appear and plead to the ſame, the plaintiff or plaintiffs in

in ſuch caſes ſhall have judgment, in ſuch manner as if the priſoner or priſoners had appeared in the ſaid reſpective courts, and refuſed to anſwer or plead to ſuch declaration.

That in all declarations againſt any priſoner or priſoners, detained in priſon by virtue of any writ or proceſs iſſued out of the court of king's bench, it ſhall be alledged, "in cuſtody of what ſheriff, bailiff, or ſteward of any franchiſe, or other perſon having the return and execution of writs, ſuch priſoner or priſoners ſhall be at the time of ſuch declaration, by virtue of the proceſs of the ſaid court, at the ſuit of the plaintiff," which allegation ſhall be as good and effectual to all intents and purpoſes, as if ſuch priſoner or priſoners were in the cuſtody of the marſhal of the Marſhalſea.

The declaration muſt alledge the priſoner to be detained "at the ſuit of the plaintiff," or it is ill, for as the ſtatute has chalked out the particular manner of declaring, the court cannot deviate from it. 1 *Wilſ.* 119. *Ld. Raym.* 1362.

Upon this ſtatute the following rules have been made by the court. *Eaſt*, 5. *W. & M.*

That no copy of a declaration be delivered, to any priſoner in cuſtody, before the day of the return of the proceſs upon which the defendant was taken or charged in cuſtody.

That no rule be given for the defendant in cuſtody, to appear and plead to any declaration againſt him, until an affidavit be filed with the clerk of the rules, of the delivering a copy of ſuch declaration, and of the time when, and the perſon to whom the ſaid copy was delivered, and that the defendant was arreſted, or charged in cuſtody by proceſs out of this court, returnable before the delivery of ſuch copy; and that the time of filing ſuch affidavit be entered upon the affidavit, by the clerk of the rules; and that a copy of ſuch affidavit be produced to the prothonotary, or ſecondary before the ſigning the judgment.

If a copy of the declaration be delivered againſt ſuch defendant before "one month of Eaſter" or "the morrow of All Souls" and affidavit made thereof and filed, and the defendant doth not appear

before the end of ten days after Eaſter and Michaelmas term, reſpectively, judgment may be entered againſt him, if rules have been given; but if he doth appear before the end of ten days after the term, he ſhall imparl until the next term, unleſs the action be in London or Middleſex, and the defendant be in priſon within forty miles of London or Weſtminſter, then, though he doth appear before the expiration of ten days, after the end of the term, he ſhall plead two days before the eſſoign day of the next term; and in default thereof, rules for pleading having been given, judgment may be entered againſt him as aforeſaid.

If a copy of the declaration be delivered againſt ſuch defendant on or before "one month of Eaſter," in Eaſter term, "or the morrow of All Souls," in Michaelmas term; or in Hilary or Trinity term, and thereupon the plaintiff gives a rule to appear and anſwer, then if the defendant appears two days before the eſſoign day of the next term he ſhall imparl until the ſaid next term; but if he doth not appear within that time, judgment ſhall be given againſt him.

If a writ be returnable in any term, and a copy of the declaration has been delivered before the eſſoign day of the next term, the plaintiff in ſuch next term may give rules to appear and plead; and if the defendant doth not appear and plead upon the expiration of the rules, judgment ſhall be given againſt him.

If the declaration be not filed before the end of the next term after the writ or proceſs, by which the priſoner was taken or charged in cuſtody, is returnable, and affidavit made and filed in manner as aforeſaid, "before the end of forty days next after ſuch term," the priſoner ſhall be diſcharged by common bail, ſigned by one of the juſtices of this court."

If any goaler or keeper of a priſon having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, and not deliver it forthwith unto ſuch priſoner, an attachment ſhall iſſue againſt him.

The

The term in which the writ is returnable, is to be accounted one of the two terms.

Declaration againſt a priſoner in cuſtody of the ſheriff.

Surry to wit. *William White* complains of *Benjamin Black*, being in the cuſtody of the ſheriff of the county of Surry, by virtue of his majeſty's writ of *latitat*, iſſuing out of the court of our lord the king, before the king himſelf, againſt the ſaid *Benjamin*, at the ſuit of the ſaid *William*, returnable before the king himſelf at Weſtminſter, on next after of a plea of (as the caſe is) for that, whereas, &c.

One copy is to be ingroſſed an treble penny ſtamp parchment, and filed with the clerk of the declarations, and three other copies made on the ſame ſtamp, one of which is to be delivered to the gaoler or turnkey, in whoſe cuſtody defendant is, aſking him at the ſame time, "if defendant is a priſoner," paying him 1*s*. If he acknowledges that the defendant is in cuſtody, an affidavit of the ſervice, is to be ſworn either before a judge or commiſſioner in the county, annexing a copy of the declaration delivered thereto; an office copy of the affidavit of the ſervice is then to be made on a treble 6*d*. ſtamp, and annexed to the other copy of the declaration, and taken to the clerk of the rules, who will give a rule to appear and plead on the copy, which he returns, and files the original; paying 3*s*. 6*d*.

Affidavit.

In the king's bench. *William White*, plaintiff, and *Benjamin Black*, defendant.

A. B. of, &c. gentleman, maketh oath and ſaith, that he did on the day of laſt paſt, deliver unto *E. T.* gaoler or keeper of his majeſty's goal, in and for the county of Surry, a true copy of the declaration hereunto annexed, and the ſaid gaoler

ler or keeper, then acknowleged to this deponent, that the ſaid defendant was a priſoner in the ſaid gaol, at the ſuit of the ſaid plaintiff *William White*, by virtue of a writ of *latitat* iſſued out of this honourable court.

A demand muſt be made in writing of the plea, either by delivering ſame to the gaoler, or turnkey, before the plaintiff can ſign judgment, paying him 1*s.* (or to the priſoner), and if the defendant does not plead within the time, judgment may be ſigned, and notice given of inquiry to the priſoner, gaoler, or turnkey, and the remaining proceedings are as in other caſes, (excepting that the defendant muſt be proceeded againſt to final judgment, within three terms.) *Rule, Trin.* 2 *Geo.* 2.

After final judgment is obtained, the priſoner muſt be charged in execution, within two terms next after ſuch judgment ſo had and obtained, the term in which the judgment is ſigned to be accounted one of the two terms. *R. Trin.* 2 *Geo.* 1.

In order to charge a defendant in execution in the cuſtody of the ſheriff, a *capias ad ſatisfaciendum* is to be made out, and lodged with the ſheriff, which is ſufficient, paying him 2*s.* 4*d.* and it is neceſſary that the judgment be entered, docquetted, and filed of record.

If the defendant is in cuſtody in Newgate, Ludgate, or any other county, city, or town gaol, at the ſuit of any other perſon, the plaintiff muſt ſue out proceſs againſt him, directed to ſuch ſheriff or ſheriffs, as the caſe is, and ſuch proceſs muſt be left with him or them at their office, in order to charge ſuch defendant in cuſtody. The affidavit and writ are as in other caſes, the ſheriff is paid for charging him in cuſtody, 2*s.* 4*d.* and the plaintiff muſt proceed againſt the defendant as before, otherwiſe he will be ſuperſeded, and he is to file a bill in this caſe before he delivers the declaration. *Sayer, Rep.* 49.

If the defendant is in the cuſtody of the marſhal of the king's bench priſon by *habeas corpus*, two copies only are made of the bill and declaration, one

on parchment, the other on paper, on treble 1*d.* ſtamp; the bill muſt be firſt filed, and then the copy delivered to the turnkey, (or the priſoner); and in this caſe, an affidavit is requiſite, but it muſt be filed within two terms next after the return of the writ, giving a rule to plead, and a plea demanded as in other caſes.

When a bill is filed againſt a priſoner in cuſtody of the marſhal, if a copy of it be delivered for him to the turnkey, four days excluſive before the end of the term, a rule to plead be given, and a plea demanded, which may be done on the back of the copy when delivered, the defendant ſhall plead as of that term; but if the bill be not filed, and the copy delivered four days excluſive before the end of the term, the defendant may imparl until the next term, *R. H.* 5 *W. & M.*

The plaintiff muſt alſo proceed to trial and judgment within the three terms next after the declaration delivered, accounting that term one, *R. Tr.* 2 *Geo.* 1. and alſo charge defendant in execution, within two terms after final judgment ſigned, accounting that term as one. *Ibid.*

Declaration againſt a priſoner in cuſtody of the marſhal.

Middleſex, to wit. *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea of our lord the king, before the king himſelf: For that whereas, &c.

In order to charge a priſoner in execution in cuſtody of the marſhal, a rule is to be had from the clerk of the rules for the marſhal to acknowledge the defendant in his cuſtody, for which acknowledgment the marſhal is paid 10*s.* 6*d.* and on a piece of parchment in the ſhape of a bail-piece, the *committitur* is entered in this manner:

Committitur

Committitur *piece*

" Trinity Term, 23 *Geo.* 3.

Stormont and *Way.*

" Middleſex, to wit. *Benjamin Black* is committed to the cuſtody of the marſhal, &c. at the ſuit of *William White*, for fifty pounds damages there to remain until, &c.

A. B. attorney. Judgment of Eaſter term, 23 *Geo.* 3 *Roll.*"

This is taken to the clerk of the judgments, paying him 2*s.* and filed with him before the laſt day of the term in which the plaintiff is to charge defendant in cuſtody, as he muſt enter it on the roll, or defendant will be ſuperſedeable. 4 *Burr.* 1841, then the *committitur* is entered in the marſhal's book, at the clerk of the judgments, which is neceſſary to be done before it is delivered over, paying 6*d.*

In order to charge a priſoner in the cuſtody of the marſhal at the ſuit of a new plaintiff, it muſt be obſerved that by rule, *Eaſt.* 15 *Geo.* 2. no declaration, whereby any priſoner ſhall be charged in cuſtody of the marſhal, ſhall be ſufficient cauſe of detaining ſuch priſoner in cuſtody, unleſs an affidavit that the plaintiff's cauſe of action againſt ſuch priſoner does amount to ten pounds or upwards, ſhall be firſt made and filed with the clerk of the rules of this court, and the ſum ſpecified in ſuch affidavit ſhall be indorſed by him upon ſuch declaration before the leaving thereof with the turnkey.

The bill (if in vacation) muſt be filed as of the preceding term, and the affidavit of the debt is to be ſworn before a judge (or the ſigner of the writs) a copy on treble penny ſtamp paper of the bill and the affidavit, are to be taken to the clerk of the rules, who will indorſe on the declaration the ſum ſworn to; the affidavit is left with him, paying filing 2*s.* and the declaration ſo marked muſt then be delivered to, or left with the turnkey of the king's bench priſon, paying him 1*s.* on his acknowledging

the defendant to be in cuſtody, the further proceedings are as before. 2 *Burr.* 1052. *R. E.* 15 *Geo.* 2.

If a priſoner removes himſelf into cuſtody of the marſhal by *habeas corpus*, and there are actions againſt him returned on the writ in the common pleas, the plaintiff may declare againſt him as in cuſtody of the marſhal in this court, though there be no proceſs to warrant it; but if he be charged with a declaration in the Fleet, and afterwards removes himſelf to the king's bench priſon, the plaintiff may proceed to judgment againſt him in the common pleas, and bring a *habeas corpus ad ſatisfaciendum*, to charge him in execution in that court, who will commit him to the Fleet.

If a priſoner in the cuſtody of the marſhal be charged with a declaration in this court, and he afterwards removes himſelf to the Fleet, the plaintiff muſt proceed to judgment in this court, and the defendant muſt be brought back by *habeas corpus ad ſatisfaciendum*, to be charged in execution here.

The term and number roll muſt be indorſed on the *habeas corpus ad ſatisfaciendum*.

If a priſoner in the Fleet charged with a declaration in the common pleas, removes himſelf by *habeas corpus* to the cuſtody of the marſhal, the plaintiff may proceed to judgment in the common pleas, and then may carry him back by an *habeas corpus ad ſatisfaciendum*, to charge him in execution. *R. Trin.* 2 *Geo.* 1.

In proceeding by original againſt the defendant in cuſtody of the ſheriff of any county, if the defendant is in cuſtody of any ſheriff, &c. upon a ſpecial *capias*, the plaintiff declares againſt him by delivering a declaration only, on treble penny ſtamp paper.

Declaration.

Surry, to wit. *Benjamin Black*, late of, &c. gentleman, was attached to anſwer *William White* in a plea of (as the action is) and whereupon the ſaid *William White*, by *A. B.* his attorney, complains: That whereas (as in other caſes) but it is not alledged by original in whoſe cuſtody the defendant is; but

affidavit of the ſervice is required, and the future proceedings are the ſame as by bill.

A priſoner may, any time pending the action, and before final judgment, file ſpecial bail, and juſtify the ſame, and in that caſe, he may be diſcharged as to that action by *ſuperſedeas*, if in the cuſtody of the ſheriff; if in cuſtody of the marſhal, by a judge's order only.

If a priſoner plead in perſon, he does not pay for the iſſue, otherwiſe by attorney, nor muſt the iſſue be delivered to the attorney, if he plead in perſon. 2 *Wilſ.* 11.

A defendant priſoner, although ſuperſedable, but not actually ſuperſeded, if found in cuſtody, may be charged with a declaration. 4 *Burr.* 1048.

If any defendant ſhall be committed to the cuſtody of the marſhal of this court, or charged in cuſtody of the ſaid marſhal, or arreſted or committed by virtue of the proceſs of this court, to the cuſtody of any ſheriff or other officer whatſoever, at the ſuit of any plaintiff, and ſhall ſo remain in cuſtody for two terms; and the plaintiff ſhall not declare againſt ſuch defendant within that time; then ſuch defendant, after the end of the ſecond term after ſuch impriſonment, ſhall be diſcharged out of the priſon where he ſhall be ſo detained on filing common bail, by an order ſigned by one of the juſtices of this court, without giving notice to the plaintiff or his attorney. *R. Trin.* 2 *Geo.* 1.

The term in which the writ whereon the defendant is arreſted, is returnable, is to be accounted one of the two terms, although the writ be returnable on the laſt day of the term; and ſo likewiſe the term wherein the defendant was committed to the cuſtody of the marſhal, by *habeas corpus*, is to be accounted one, although not committed till the laſt day of vacation. *Ibid.*

In order to diſcharge a priſoner on the plaintiff not declaring if in cuſtody of the ſheriff, &c. a certificate muſt be got from the goaler of the cauſes he is charged with, and a ſummons had from a judge for the plaintiff to ſhew cauſe why a writ of *ſuperſedeas* ſhould

ſhould not iſſue to diſcharge the defendant, which is to be ſerved on the plaintiff's attorney, and if he does not attend, on affidavit of ſuch ſervice and attendance thereon, (as there is but one ſummons neceſſary), the judge will grant an order for a *ſuperſedeas*, upon filing common bail, paying ſummons in term, 1*s.* vacation, 2*s.* order 4*s.* common bail and certificate, 3*s.* 4*d.*

If the defendant is in the cuſtody of the marſhal, application muſt be made to the clerk of the papers of the king's bench priſon for a copy of the cauſes wherein he ſtands charged, and a ſummons taken out as before, to diſcharge the defendant thereon which is to be ſerved on the plaintiff's attorney, if he does not attend, the order will be made, upon filing common bail, the marſhal (upon the clerk of the common bails certificate), will diſcharge the defendant without a *ſuperſedeas*.

If the action be by original, the proceedings are the ſame, but when the order is made, an appearance is to be filed with the filazer, paying 2*s.* 6*d.* and he will make out a *ſuperſedeas* thereon, paying 3*s.* 10*d.* ſealing 7*d.* if the defendant is in cuſtody of the ſheriff, if in cuſtody of the marſhal, he will certify to him, nothing is paid for the certificate.

During a treaty between the plaintiff and a defendant, who is a priſoner, the plaintiff is not obliged to declare within two terms, 3 *Wil.* 455. but it muſt be ſhewn that ſuch treaty prevented the plaintiff declaring.

If the defendant be ſuperſeded for want of proceeding before judgment, yet the plaintiff may, after judgment obtained, take him in execution; but otherwiſe, if the defendant be ſuperſeded for want of being charged in execution. *R. T.* 2 *Geo.* 1.

Of charging in execution.

If any plaintiff ſhall declare againſt a defendant, priſoner in the cuſtody of the marſhal of this court, or any ſheriff or other officer as aforeſaid remaining, and ſhall not proceed to trial or judgment within three terms next after ſuch declaration delivered, (the term in which the declaration ſhall be delivered to be ac-

counted one,) or if any plaintiff ſhall obtain judgment in the court here in any action againſt any defendant a priſoner, and ſhall not charge the ſaid defendant ſo in priſon remaining, in execution upon the judgment ſo obtained, within two terms next after ſuch judgment ſo had and obtained; (the term wherein judgment ſhall be obtained, to be reckoned one,) then ſuch defendant ſo in priſon remaining ſhall have leave to file common bail, or to ſue out a writ of *ſuperſedeas* out of the court here, according to the courſe of this court for his diſcharge out of cuſtody aforeſaid, where he ſhall be ſo detained, to be granted by one of the juſtices of this court, if cauſe ſhall not be ſhewn to the contrary by the plaintiff or his attorney, upon notice to them or either of them given by the attorney for the defendant, and oath of the ſaid notice to be made, if the ſaid plaintiff ſhall not appear before the judge aforeſaid, to hinder filing the common bail aforeſaid, or making the aforeſaid writ of *ſuperſedeas*, R. Trin. 2 *Geo.* 2.

According to this rule, if the declaration is delivered in Hilary term, the plaintiff muſt ſign final judgment the laſt day of Trinity term, and charge the defendant in execution, the laſt day of Michaelmas term.

Plaintiffs proceeded to final judgment in Michaelmas term 1767, the plaintiffs became bankrupts between that and Hilary term, and the aſſignees ſued a *ſcire facias* for execution upon the judgment, returnable the 1ſt of Hilary 1768: the defendant pleaded a plea which was held bad upon demurrer in ſame term, and therefore the defendant prevented himſelf from being charged in execution in Hilary term, which might have been done if he had not pleaded. Upon motion for a *ſuperſedeas*, the court held that the bankrupts could not charge the defendant in execution in Hilary term, becauſe the aſſignees were intitled to the benefit of the judgment, therefore the rule for the *ſuperſedeas* was diſcharged, the aſſignees having made due diligence. 2 *Wilſ.* 378.

If a defendant ſurrender himſelf after judgment in diſcharge of his bail, the plaintiff muſt charge him in

in execution in two terms (the term wherein he ſurrenders, to be accounted one) or he may be diſcharged on filing common bail, unleſs proceedings be ſtayed by writ of error or injunction.

If a defendant delays the plaintiff from proceeding by a writ of error, he muſt charge him in execution within two terms after affirmance, including the term in which the judgment is given. 2 *Wilſ.* 280.

If the defendant renders in Eaſter term, and declaration filed of Hilary, (although plaintiff has tried his cauſe), yet he is not bound to ſign final judgment, till the laſt day of Trinity term; nor to charge him in execution till the laſt day of Michaelmas term.

To proceed to diſcharge the priſoner for the plaintiff's not proceeding to judgment, or charging in execution in due time, if the defendant is in cuſtody of the ſheriff, application muſt be made to the gaoler for a copy of the cauſes he has againſt him, and what proceedings have been had with him, and a ſummons taken out to ſhew cauſe at a judge's chambers, which muſt be ſerved on the plaintiff's attorney, if he does not attend, the defendant will upon the third ſummons have an order of courſe, on an affidavit of the ſervice and due attendance; but if he ſhould attend, and it is a country cauſe at a diſtance, the firſt is an order *niſi*, within a limited time; giving time to the agent to write to his client, and then an order abſolute, if no cauſe ſhewn: the agents in town generally indorſe the ſummons, unleſs cauſe ſhewn in a week, &c. for which a fee of 10*s.* 6*d.* is paid them.

Upon the order in either caſe being made, a writ of *ſuperſedeas* iſſues for his diſcharge.

If the defendant is in cuſtody of the marſhal, a copy of the cauſes is to be had of the clerk of the papers, king's bench priſon, and a ſummons as before taken out, and upon an order being obtained, common bail filed with the clerk of the common bails, if by bill, if by original, with the filazer, who will give certificate for a diſcharge on bail being filed, or appearance entered.

If

If the defendant is in the cuſtody of any gaoler, &c. for felony, upon producing the affidavit ſworn before a judge, or the ſigner of the writs of the debt, the judge will give an order to detain him, in this caſe the affidavit is filed with the ſigner of the writs, and a writ ſued out as in other matters, paying for the order 5ſ. the writ and original order are taken to the ſheriff and left with him, paying him 2ſ.

Affidavit of ſervice of the ſummons.

William White, plaintiff,
In the king's bench, and
Benjamin Black, defendant.

C. D. of, &c. gentleman, maketh oath and ſaith, that he did, on the day of laſt paſt, ſerve a true copy of the ſummons hereto annexed, on Mr. *A. B.* who acts as attorney or agent for the plaintiff in this cauſe, by leaving the ſame at the houſe of the ſaid *A. B.* in with the clerk or ſervant there. And this deponent further ſaith, that he did alſo ſerve Mr. *A. B.* with another true copy of the ſummons hereto annexed, on the day of laſt, by leaving the ſame with the clerk or ſervant of the ſaid *A. B.* at his houſe aforeſaid. And this deponent did alſo, on the day of laſt, perſonally ſerve the ſaid *A. B.* with a true copy of the ſummons hereto annexed. And this deponent did, on the ſeveral days mentioned in the ſaid ſummons, duly attend at the chambers of the right honourable *William* earl Mansfield, in Serjeant's inn, Chancery-lane, London, but no one attended on behalf of the ſaid plaintiff.

It is very common to ſave this affidavit and the three ſummonſes, by getting plaintiff's attorney to go to the chambers; and the clerk will make an order upon hearing, conſent 10ſ. 6*d*. order 4ſ. If its a country cauſe the order will be *niſi*, unleſs cauſe is ſhewn in a week. If its an order *niſi*, 6ſ. is paid.

Superſedeas

Superſedeas.

George the Third, &c. To the ſheriff of *Surry*, greeting: Whereas it was lately commanded that you ſhould take *Benjamin Black*, if he might be found in your bailiwick, and keep him ſafely, ſo that you might have his body before us at Weſtminſter, on next, after to anſwer to *William White*, in a plea of treſpaſs, and alſo to a bill of the ſaid *William*, to be exhibited againſt the ſaid *Benjamin*, for one hundred pounds upon promiſes, according, &c. and becauſe the ſaid *Benjamin* came into our court before us, and hath filed common bail in the ſaid action, and the ſaid *William* not having declared againſt him, within two terms next after the ſaid taking, therefore we command you that you, wholly ceaſe from taking, arreſting, or impriſoning, the ſaid *Benjamin*, or any ways moleſting him on that occaſion, and no other; and if you have taken him and do detain him, that then you cauſe him to be delivered without delay, from the priſon wherein he is ſo detained, at your peril. Witneſs *William* earl Mansfield at Weſtminſter, the day of , in the twenty-third year of our reign.

Stormont and *Way*.

Præcipe.

Surry, to wit. *Superſedeas* for *Benjamin Black*, ats. *William White*, *C. D.* attorney.

Signing 1*s.* 8*d.* ſealing 7*d.* The ſheriff's fee varies: in London and Middleſex, it is 2*s.* *d.* in other counties 8*d.*

The *ſuperſedeas* is the ſame on original only ſaying; "and becauſe the ſaid *Benjamin* came into our court before us, and hath appeared in the ſaid action, and the ſaid *William* not having declared, &c. as above." Signing 3*s.* 10*d* ſealing 7*d.* and the filazers name is put inſtead of that of the chief clerk.

Superſedeas

Superſedeas *for not proceeding to trial and judgment.*

George the third, &c. to the ſheriff of Surry, greeting; Whereas *Benjamin Black* is detained in our priſon, under your cuſtody, by virtue of a certain writ of *latitat*, returnable on, &c. to anſwer *William White*, in a plea of treſpaſs, and alſo to a bill of, &c. And whereas the ſaid *Benjamin* afterwards, in term laſt paſt, was charged with a declaration at the ſuit of the ſaid *William*, in the plea aforeſaid; but becauſe it appears to us that the ſaid *Benjamin* hath filed common bail to anſwer the ſaid *William*, in the plea aforeſaid, and that the ſaid *William* hath not proceeded to judgment againſt the ſaid *Benjamin*, within three terms next after the delivery of the ſaid declaration, as required by the rules of our ſaid court, we command you that you wholly ceaſe from taking, &c. as in the other.

Superſedeas *for not charging defendant in execution.*

George, &c. as in the other, as far as "plea aforeſaid,", and becauſe the ſaid *William* hath not proceeded to charge the ſaid *Benjamin* in execution, within two terms next after judgment obtained, according to the rules of our ſaid court, before us, we therefore command you, that you wholly ceaſes, &c. as in the other.

Superſedeas *on putting in good bail.*

(After recital of the writ), and becauſe it ſufficiently appears to our ſaid court before us, that the ſaid *Benjamin* hath found ſufficient bail, to anſwer the ſaid *William* in the plea aforeſaid; therefore we command you, that if the ſaid *Benjamin* is detained in our ſaid priſon in your cuſtody, by occaſion of the ſaid action, and no other, then you permit him to go at large, as you will anſwer the contrary at your peril. Witneſs, &c.

A priſoner

A prisoner committed for a contempt cannot be charged with a declaration without leave of the court. *Pract. Reg.* 325.

But if he accept a declaration, and suffers the plaintiff to take judgment, he hath no remedy. *Rules and Orders B. R. and C. B.* 2 *vol.* 31.

A prisoner on a criminal account cannot be charged in a civil action, without leave of the court. *Salk.* 354.

But a prisoner on a charge of felony may be charged with a *latitat*. Daintree *v.* Justice, Hil. 9 Geo. 3.

The court will not give leave to charge a prisoner with an action, who has a pardon on condition of transportation, because it would defeat the effect of the pardon, and render the prisoner incapable of performing the condition upon which he was pardoned.

Neither court will grant the plaintiff a rule for time to declare against a prisoner. *Prac. Reg.* 327.

But in a writ against three, and one was taken and laid in gaol, and the other two absconded, the court refused to discharge the prisoner, saying, he must appear for all, or lay in gaol until the other two are outlawed; but in such case the plaintiff must move for time to declare against him in custody. *East.* 12 *Geo.* 3.

More than two terms had elapsed after the prisoner was in custody, and before the plaintiff declared; and it was moved, that the prisoner might be discharged by *supersedeas*, the plaintiff having neglected to declare within the two terms. On shewing cause, it appeared that there had been a treaty of accommodation, and that breaking off, then the plaintiff declared; and the court held, that while a treaty subsists between the plaintiff, and the defendant a prisoner, the plaintiff is not obliged to declare within the two terms, according to the practice; for it is for the prisoner's benefit that the plaintiff listens to terms of accommodation. 3 *Wilf.* 455.

The court refused to discharge a prisoner for want of proceeding within two terms; a mistake having arisen from two persons being of the same name. *Lofft.* 274.

If a priſoner on meſne proceſs eſcapes, and is retaken on an eſcape warrant, the plaintiff muſt declare within two terms after he is taken on the eſcape warrant. *Rule*, 6 *Anne*.

If a defendant is in cuſtody of the ſheriff, and the plaintiff has declared againſt him as in ſuch cuſtody, he may, notwithſtanding, remove the defendant into the cuſtody of the marſhal by *habeas corpus ad faciendum et recipiendum*. Dr. Betteſworth *v.* Bell, Eſq. Burr. Rep. 4 pt. 1875.

A declaration againſt a priſoner in cuſtody muſt ſhew at whoſe ſuit he is in cuſtody. *Ld. Raym.* 1362. *S.P.* 1 *Wilſ.* 120.

A priſoner once ſuperſedeable is always ſo with reſpect to the plaintiff in that cauſe; but not as to third perſons; for ſo long as he is in cuſtody he may be charged by them as a priſoner. *Burr. Rep.* 4 *pt.* 1047.

After an irregular declaration againſt a priſoner, the plaintiff cannot proceed *de novo*, unleſs the priſoner is in cuſtody at another's ſuit.

The defendant obtained a *ſuperſedeas* for want of proſecution; but having, whilſt a priſoner, drawn a bill of exchange, in favor of the plaintiff, for part of the original debt, which was refuſed to be accepted, the plaintiff cauſed him to be arreſted on that bill as going out of priſon. The defendant ſwore that the draught was by agreement to be returned if not accepted. The court thought that by this draught which if paid would have diſcharged part of the original demand, no new debt was contracted; and ordered a *ſuperſedeas* to the new action on entering a common appearance. *Barnes* 397.

Notice of trial to a turnkey is good in the caſe of a priſoner defendant. *Stra.* 248.

Within two terms after final judgment, the plaintiff charged the defendant with an action of debt upon the judgment, inſtead of charging him in execution. The court held this vexatious, and made the rule for a *ſuperſedeas* abſolute. *Barnes* 390.

A priſoner diſcharged for want of proceeding judgment may be afterwards taken in execution; but

other

otherwiſe if diſcharged for want of being charged in execution. *Pract. Reg.* 333. *Rules and Orders B. R. and C. B.* 135, 6.

A priſoner diſcharged upon an inſolvent act, and afterwards arreſted for a debt exceeding the ſum limitted in that act, ſhall not be diſcharged upon common bail. *Lord Raym.* 1088.

A defendant diſcharged upon the 32 *Geo.* 2. *c.* 28. cannot be retaken on execution or a new action. 1 *Barnes* 271.

A priſoner on a *capias utlagatum* diſcharged on an inſolvent act cannot be taken again on a new *capias utlagatum*. 1 Barnes 278.

An action on the caſe lies againſt an attorney for neglecting to charge a priſoner in execution in due time. Alſo, if the defendant obtains a *ſuperſedeas* for want of the plaintiff's declaring within two terms. *Ruſſel* v. *Palmer*, *C. B.* 2 *Wilſ.* 325. *Pitt* v. *Yalden*, *Burr. Rep.* 4 *pt.* 2068.

If the defendant be ſuperſeded for want of being charged in execution, and debt be brought on the judgment, and a ſecond judgment recovered thereon, he may be taken in execution on the ſecond judgment. *Iſmay* v. *Derwin*, *C. B.* 2 *Blackſt. Rep.* 982.

Of the diſcharge of priſoners according to the ſtatute, 32 *Geo.* 2. *c.* 28.

It is by the ſtatute enacted, that if any perſon in execution for a ſum not exceeding one hundred pounds, ſhall be minded to deliver up to his or her creditor, who ſhall ſo charge him or her, all his or her eſtate and effects, towards ſatisfaction of the debt, ſuch priſoner ſhall before the end of the firſt term next after he or ſhe ſhall be charged in execution, exhibit a petition to any court of law from whence the proceſs iſſued, upon which any ſuch priſoner was taken and charged in execution, or into the court where any ſuch priſoner ſhall be removed by *habeas corpus*, or ſhall be charged in cuſtody, and ſhall remain in the priſon thereof, certifying the cauſe of his or her impriſonment, and ſetting forth a juſt and true account

of his or her real and perſonal eſtate, to which he or ſhe or any in truſt for him or her is, was, or were intitled at the time of his or her petitioning, and of all incumbrances, affecting any ſuch real or perſonal eſtate of the perſon ſo petitioning, and alſo a juſt and true account of all the real and perſonal eſtate which any ſuch priſoner, or any perſon in truſt for him or her, or for his or her uſe, was or were intereſted in, or intitled to, at the time of his or her firſt impriſonment, either in poſſeſſion, reverſion, remainder, or expectancy, to the beſt of his or her belief; and the ſecurities, bonds, notes and books relating thereto, with the names and places of abode of the witneſſes. And before any petition ſhall be received, every priſoner ſhall give or leave, unto and for the creditors at whoſe ſuit he or ſhe ſhall ſtand charged in execution, their executors or adminiſtrators, at his or their uſual place of abode, or to or for the attorney or agent laſt employed in any ſuch action, in caſe any ſuch creditor cannot be met with, but not otherwiſe, fourteen days at leaſt before any ſuch petition ſhall be preſented, a notice in writing, ſigned with the proper name or mark of ſuch priſoner, importing, that ſuch priſoner doth intend to petition the court from whence the proceſs iſſued, upon which he or ſhe ſtands charged in execution, or into the priſon of which any ſuch priſoner ſhall have been removed by *habeas corpus*, or ſhall ſtand charged in execution, on any judgment, recovered on any bill or declaration, filed or delivered in any ſuch court; and ſetting forth, a true copy of the account or ſchedule, including the whole real and perſonal eſtate of the perſon ſo deſigning to petition, which he or ſhe doth intend to deliver, other than and except, the neceſſary wearing apparel and bedding of the priſoner and his, her, or their family; and the tools or inſtruments of his or her trade or calling, not exceeding ten pounds in the whole. An affidavit of the due ſervice of ſuch notice to be left at the ſame time with the petition, and be read openly, and a rule to be made upon receiving the petition, for bringing the priſoner into court, and ſummoning the creditor to appear perſonally, or by attorney, at ſome certain day, and

the creditor appearing or not, in perſon, or by attorney, then upon affidavit of the due ſervice thereof ſuch court ſhall, in a ſummary way, examine into the matter of every ſuch petition, and hear what can or ſhall be alledged on either ſide, for or againſt the diſcharge of any ſuch priſoner, who ſhall ſo petition, and order an aſſignment of his effects. But if the creditor ſhew cauſe of diſbelieving his or her oath, and deſire further time for information, the court is to remand the priſoner back to a further day, and the credit or not appearing, he or ſhe may be diſcharged, unleſs the creditor inſiſt upon his or her detention, and covenant to allow him or her two ſhillings and fourpence *per* week, and upon failure at any time in payment thereof, the priſoner, upon application to the court, to be diſcharged.

That where more creditors than one inſiſt on the priſoner's detention, they ſhall pay him each not exceeding one ſhilling and ſix-pence.

That priſoners charged in execution in country and other gaols, diſtant from Weſtminſter twenty miles, ſhall proceed in like manner, by petition and affidavit; and the court ſhall make a rule thereupon, for his or her being brought up to the next aſſizes, and on a copy of the rule being ſerved on the plaintiff, &c. and affidavit made of ſuch ſervice, the court ſhall appoint a time for hearing of the petition, and the creditor appearing thereto or not, on proof being made of due ſervice, the notice, and the copy of the ſchedule of the priſoner's eſtate, the court is to proceed therein in a ſummary way, and diſcharge the priſoner,

The notice,

In the king's bench. *William White*, againſt *Benjamin Black*.

Mr. *William White*, take notice that I do intend to petition his majeſty's court of king's bench at weſtminſter, after the expiration of fourteen days, after notice hereof given, [If at the aſſizes is added, "for a rule

a rule or order that I may be taken before his majeſty's juſtices of aſſize, at the next aſſizes to be held at in and for the county of "] that I may have ſuch relief and benefit as I may be intitled unto, by virtue of, and under an act of parliament made in the thirty-ſecond year of the reign of his late majeſty king George the ſecond, for relief of debtors, with reſpect to the impriſonment of their perſons, and the following is a true copy of the ſchedule which I do intend to deliver into the ſaid court with my ſaid petition, as witneſs my hand this day of one thouſand ſeven hundred and eighty four.

Benjamin Black.

If the priſoner hath no effects exceeding thoſe which he is allowed to retain, "and that I ſhall not at the ſame time deliver in any ſchedule or inventory of any eſtate or effects whatſoever, having none, ſave and except the wearing apparel and bedding of or for me and my family, and the tools or inſtruments of my trade or calling not exceeding ten pounds in value in the whole."

The ſchedule.

A ſchedule or inventory of all the eſtate and effects which I *Benjamin Black*, a priſoner in execution, in his majeſty's priſon of the king's bench, at the ſuit of *William White*, or any perſon or perſons in truſt for me, was or were poſſeſſed of, or intitled unto, at the time of my firſt impriſonment, at the ſuit of the ſaid *William White*, or at any time ſince, except the wearing apparel and bedding of or for me or my family, and the tools or inſtruments of my trade or calling not exceeding ten pounds in value in the whole, to wit,

Petitio

Petition.

To the right honourable *William* earl Mansfield, lord chief juſtice of his majeſty's court of king's bench, and the juſtices of the ſame court.

The humble petition of *Benjamin Black*.

Sheweth,

That your petitioner is a confined priſoner in execution, in his majeſty's priſon of the king's bench, and was taken in execution the day of 1783, at the ſuit of *William White*, for the ſum of fifty pounds debt, and ſixty-three ſhillings damages, by virtue of his majeſty's writ of *capias ad ſatisfaciendum*, iſſuing out of this honourable court, as by the certificate hereunto annexed appears.

That your petitioner humbly apprehends he is entitled to the benefit of an act of parliament made in the thirty-ſecond year of the reign of his late majeſty king George the ſecond, for the relief of debtors, with reſpect to the impriſonment of their perſons, and is willing and deſirous to conform himſelf to the directions of the ſaid act of parliament.

That your petitioner hath not at the time of this his petition, nor had he at the time he was taken in execution, or at any time ſince, any debts, eſtates or effects whatſoever, other than and except the neceſſary wearing apparel and bedding for himſelf and family, and the tools or inſtruments of his trade or calling, not exceeding ten pounds in value, in the whole, beſides what is contained in the ſchedule or inventory hereto annexed.

Your petitioner therefore moſt humbly prays the order of this honourable court, directing the marſhal of the Marſhalſea of his majeſties court of king's bench, to bring your petitioner into this court, at a day for that purpoſe to be appointed, and the ſaid *William White* then and there to ſhew cauſe, if any he hath, againſt your petitioner's diſcharge, and that your

your petitioner may have ſuch relief and benefit as he may be entitled unto, by virtue of the ſaid act.

And your petitioner ſhall ever pray, &c.

Affidavit to be annexed.

C. D. of, &c. gentleman, maketh oath and ſaith that he did ſee *Benjamin Black*, the petitioner, in the petition hereto annexed, ſign the notice hereto annexed, and that the name *Benjamin Black*, ſet and ſubſcribed at the foot of the ſaid notice, is of the proper hand-writing of the ſaid *Benjamin Black*. And this deponent further ſaith, that he did ſee the ſaid *Benjamin Black* alſo ſign his name at the foot of the ſchedule alſo hereto annexed, and that the name *Benjamin Black*, ſet and ſubſcribed thereto, is of the proper hand-writing of the ſaid *Benjamin Black*.

The petition and affidavit are to be ingroſſed on unſtamped paper, and ſworn in town before a judge, *gratis*; in the country before a commiſſioner; a copy of the cauſe from the gaoler or marſhal is to be alſo annexed, on which the clerk of the rules will give a rule to bring up the defendant, and for the plaintiff to appear, a copy of the rule is to be ſerved on or left at the abode of the plaintiff, and alſo on the gaoler, and an affidavit made of ſuch ſervice on plain paper, and annexed to the rule.

The priſoner had given notice in a former term, to be diſcharged purſuant to this act above fourteen days, but nothing being done therein, by reaſon that he had not annexed a ſchedule in the requiſite form to the notice (though he had in reality no effects), upon this diſcovery, he gave a new notice, having then only 13 days remaining, unleſs the firſt and laſt were both included; the queſtion was, Whether he ſhould be diſcharged? Mr. juſtice Yates obſerved that upon returns to writs of *mandamus* and *ſcire facias*, the rule was, that there muſt be fifteen days between the teſte and return, and yet in practice there were only fourteen days, one of the firſt or laſt always being included; ſo upon a *ſuperſedeas* for want of declaring

claring before the end of two terms, one of the two s always included. By analogy therefore to these nſtances he thought the court might, in favour of iberty, make the computation in the preſent caſe, ſo s to include one of the days; he choſe however to ay hold of the circumſtances of the firſt notice, and aid there was no ſurpriſe on the plaintiff, nor any ntention of ſurpriſing him, though he acknowledged, hat ſtrictly ſpeaking, two inſufficient notices could ot amount to one good one. Mr. juſtice Willes oming into the ſame ſentiment, and the plaintiff's at- orney not diſputing it, the priſoner was diſcharged. *Morley* v. *Vaughan*, 4 *Burr.* 2525.

Chap. XXXVIII.

Of proceedings to Outlawry.

WHEN a defendant abſconds, and the plaintiff would proceed to outlawry againſt him, a *præcipe* for an original muſt be drawn out, containing he whole declaration or count, and ſetting forth ac- urately the name, degree, profeſſion, or myſtery f the defendant, 1 *Hen.* 5. *c.* 5. and the town or amlet, place and county, where he is or was con- erſant,

Formerly no one could be outlawed but for felony; ut ſomething earlier than *Bracton*'s time, proceſs of utlawry was ordained to be in all actions for treſ- aſſes *vi et armis*. Co. Litt. 128. And now by di- ers ſtatutes, outlawry lieth in divers actions merely vil, if commenced by original, 1 *Sid.* 159. ſo that ow outlawry in civil actions is conſidered merely as civil proceſs, to compel an appearance to the ſuit; r to procure ſatisfaction after judgment. The for- iture, though nominally to the king, yet in truth es to the plaintiff towards payment of his demand. the outlaw appears, he pays all the coſts, puts in ficient bail, if requiſite, and does every thing he can

to put the plaintiff in as good a condition as he would have been in originally; and when after judgment, the outlaw pays the debt and coſts, the court reverſes the outlawry upon motion, without any writ of error. The form of the reverſal always is, "For the errors aſſigned, and other errors appearing upon the record," although there is, in truth, no error at all. 4 *Burr.* 2549.

Proceſs to outlawry muſt be always uſed where in an action againſt two, the one is arreſted, and the other cannot be found, for as the plaintiff cannot declare againſt them ſeparately, therefore the abſconding perſon muſt be outlawed; that the bail of the party arreſted may not be diſcharged, at the end of the ſecond term of the return of the writ, a rule to declare againſt him muſt be ſerved on his attorney, and ſo to do from term to term, until the other party appears, or is outlawed.

The *præcipe* ſhould be taken to the curſitor of the county to make out the original; but is uſually carried directly to the filazer, who procures the original from the curſitor, at his leiſure, and immediately makes out the *capias*.

The curſitor is paid two ſhillings and ſix-pence for the firſt count, and ſix-pence for every other count in the *præcipe*; the filazer is paid after the ſame rate, and four pence for filing the original.

If the curſitor hath the *præcipe* before the eſſoign day of a term, the original may be made returnable on any return of the preceding term.

The *capiàs*, *alias*, and *pluries*, may be had at the ſame time of the filazer, if there is time for the proper *teſte* and return to each writ ſince the cauſe of action accrued, and are returned of courſe in this manner:

The within named *Benjamin Black*, is not found in my bailiwick.

The anſwer of
Barnard Turner,
Thomas Skinner, } Sheri

One ſhilling is paid for each return.

Th

The original must have fifteen days between the *teste* and return, the *capias* the same, and must bear *teste* the return day of the original; the *alias* the same, and bear *teste* on the return of the *capias*, and the *pluries* the same, and bear *teste* on the return of the *alias*.

The writ of *pluries capias*, when returned, is the warrant for the filazer, who in this court acts as exigenter, to make out the *exegi facias* and writ of proclamation thereon.

Defendants are sooner outlawed in London than in other places, as the county days are there more frequent.

The *exigent* should bear *teste* the return day of the *pluries*, and requires the sheriff to cause the defendant to be demanded or exacted, in five county courts successively, to render himself, and if he does, then to take him, as in a *capias*.

The writ of proclamation commands the sheriff of the county, wherein the defendant dwells, or last dwelt, to make three proclamations thereof, one in his county court, one at the general quarter sessions, and the other at least one month before the *quinto exactus*, at the church-door of the parish in which the defendant resides; or if he lives out of a parish, at the church-door of the next parish, on a Sunday, after divine service. 6 *H.* 8. *c.* 4. 31 *Eliz. c.* 3. This writ is to bear *teste* and return the same as the *exigent*.

The writ of *exigent* must go to the sheriff of the county in which the action is laid; but if the defendant resides in any other county the writ of proclamation must go to the sheriff of that county. 31 *Eliz.* 3.

If there be not five county days between the *teste* and return of the *exigent*, on application to the exigenter, an allocatur may be had to bring in the days. But if any county day be past between the last of the former county days, and the return, no allocatur shall issue, but new *exigent*, for the demand of the party must be at five county courts, successively held one after another, without any court intervening.

If the *exigent* goes into London, it is taken to one of the compters, and the clerks require the defendant upon five ſeveral *huſtings days*; and if he does not appear on the *quinto exactus*, he is returned outlawed.

The return to the *exigent* ſpecifies the five county courts in which the defendant was exacted, and the judgment of outlawry, that to the writ of proclamation when and where he was duly proclaimed.

When the *exigent* and proclamation are returned, the proclamation muſt be filed with the exigenter (the filazer) and the *exigent* taken to the clerk of the outlawries (which is alſo the filazer) who makes out the *capias utlagatum* either general or ſpecial, the one againſt the body, the other againſt the body, lands and goods, into ſuch counties as the plaintiff ſhall chuſe.

If any goods are taken upon a ſpecial *capias utlagatum*, the ſheriff will, upon application, ſummon an inqueſt to extend and appraiſe the goods, the charge of which amounts to two or three guineas; and the plaintiff may have a *ſubpœna* for witneſſes to attend the inquiſition.

The inquiſition being taken, the *capias utlagatum* muſt be returned by the ſheriff, with the inquiſition annexed and taken to the filazer, who will make a tranſcript thereof, which is to be filed with a clerk in court, in the exchequer office, who will make out a *venditioni exponas*, directed to the ſheriff, to ſell the goods and chattels appraiſed, and found upon the inquiſition.

If the ſum levied doth not exceed fifty pounds the court of exchequer will on motion order it to be paid to the plaintiff; but if above that ſum, he muſt petition the lords of the treaſury, "praying that the money levied, and in the hands of the ſheriff, may be paid to the plaintiff, towards ſatisfaction of his debt and coſts."

The petition is referred by the lords of the treaſury to their ſolicitor, before whom the plaintiff muſt lay an affidavit ſworn before a baron of the exchequer, of his debt and proceedings againſt the defendant, the attorney's bill, *venditioni exponas* and return

return, and a certificate of the proceedings on the outlawry from one of the ſworn clerks of the exchequer. On the ſolicitor's report, a warrant goes from the treaſury to the attorney-general to conſent that the money in the hands of the ſheriff be paid over to the plaintiff towards the debt and coſts on his moving the court of exchequer for that purpoſe.

The whole expences are about twenty pounds.

The order is then drawn up under ſeal by the clerk in court with a *ſubpœna* annexed for the performance, and the ſheriff ſerved therewith, and if he doth not then pay over the money to the plaintiff, the court will, on motion, grant an attachment againſt him.

Exigent.

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you, that you cauſe *Benjamin Black*, late of Brentford, in your county, gentleman, to be demanded from county-court to county-court, (if in London, "from huſting to huſting"), until, according to the law and cuſtom of our kingdom of England, he be outlawed, if he does not appear; and if he does appear, then take him and ſafely keep him, ſo that you may have his body before us, on whereſoever we ſhall then be in England, to anſwer to *William White* of a plea, "for that whereas," (here is inſerted the whole *præcipe*) to the ſaid *William*, his damage of one hundred pounds, as it is ſaid, and whereupon you did in laſt paſt (the return of the *pluries*) make return to us, that the ſaid *Benjamin* was not found in your bailiwick; and have you there this writ. Witneſs, &c.

Signed by the filazer, paying according to the counts, ſealing 7*d*.

Proclamation.

George the Third, &c. To the ſheriff of Middleſex, greeting: Whereas, by our writ, we lately commanded you, that you cauſe *Benjamin Black*, late of the pariſh of Brentford, in your county, gentleman,

tleman, to be demanded from county court to county-court, until, according to the law and cuſtom of our kingdom of England he be outlawed, if he ſhall not appear; and if he ſhould appear, then that you ſhould take him and keep him ſafe, ſo that you may have him before us on wheresoever we ſhall then be in England, to anſwer to *William White* in a certain plea of treſpaſs on the caſe, to the damage of the ſaid *William*, of one hundred pounds, as is ſaid: We command you, that according to the ſtatute made in the thirty-firſt year of the reign of Elizabeth, late queen of England, you cauſe the ſaid *Benjamin* to be proclaimed three ſeveral days, according to the form of the ſaid ſtatute, one of which proclamations to be made at or near the moſt uſual church-door of the pariſh where the ſaid *Benjamin* is an inhabitant, that he render himſelf to you, ſo that you may have his body before us at the aforeſaid time, to anſwer the ſaid *William* of the plea aforeſaid, and have there this writ. Witneſs, *William* earl Mansfield, &c.

Signed by the filazer, paying 7*s*. ſealing 7*d*.

Special capias utlagatum.

George the Third, &c. To the ſheriff of Middleſex, greeting: We command you, that you omit not by reaſon of any liberty in your bailiwick, but that, by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, *Benjamin Black*, late of the pariſh of Brentford, in your county, gentleman, hath or had in your bailiwick the day of laſt paſt, or at any time afterwards, on which day he was outlawed in your county, at the ſuit of *William White*, in a certain plea of treſpaſs on the caſe, to the ſaid *William*, his damage of one hundred pounds, as you have returned to us ſome time ſince, and by their oath cauſe the ſame to be extended and appraiſed, according to the true values thereof; and what you find by that inquiry take into your hands, and keep ſafe, ſo that you anſwer

ſwer to us the values and iſſues thereof; and having ſo extended and appraiſed the ſame, what you ſhall have done herein, make known to us on wheresoever we then be in England, diſtinctly and plainly under your ſeal, and the ſeals of thoſe, by whoſe oath you ſhall have made the extent and appraiſement, and for that the ſaid *Benjamin* conceals himſelf, and runs up and down from place to place in your county, in contempt of us, and in prejudice of our crown, as we are informed: We command you that you take the ſaid *Benjamin* wheresoever he be going in your county, as well within a liberty as without, and keep him ſafely, ſo that you may have him before us at the aforeſaid time, to do and receive what our ſaid court before us ſhall in this caſe determine; and have you there this writ. Witneſs, &c.

Signing, by the filazer, paying ſigning 4*s.* ſealing 7*d.* warrant to the ſheriff 2*s.* 4*d.*

Petition to the lords commiſſioners of the treaſury.

To the right honourable the lords commiſſioners of his majeſty's treaſury.

The humble petition of *William White*,

Sheweth,

That *Benjamin Black*, late of Brentford, gentleman, merchant, being juſtly indebted unto your petitioner, in the ſum of one hundred pounds, your petitioner did, at his very great charge, in laſt, ſue the ſaid *Benjamin Black* to an outlawry.

That by virtue of a writ of ſpecial *capias utlagatum*, directed to the ſheriff of Middleſex, ſeveral goods of the ſaid *Benjamin Black* were ſeized, and by an inquiſition taken thereon, found to be of the value of fifty pounds, which writ and inquiſition being tranſcribed into his majeſty's court of exchequer, at Weſtminſter, a writ of *venditioni exponas* duly iſſued out of the ſaid court, whereon the ſaid ſheriff hath returned

turned, that he has, by virtue thereof, ſold the goods and chattels in the ſaid writ mentioned, at the price at which they were appraiſed, which money ſtill remains in the hands of the ſaid ſheriff.

That your petitioner has been at great expence in the ſaid proceedings, which, with your petitioner's ſaid debt, far exceeds the ſum remaining in the hands of the ſheriff.

Wherefore your petitioner humbly prays your lordſhips, that the money ſo levied as aforeſaid may be paid over to your petitioner.

And your petitioner ſhall ever pray, &c.

Certificate of the clerk in court.

"Theſe are to certify, that in term, in the twenty-third year of the reign of his preſent majeſty king George the third, a tranſcript of an outlawry was returned and filed in this court, againſt *Benjamin Black*, late of Brentford, outlawed in Middleſex, at the ſuit of *William White*, in a plea of treſpaſs on the caſe, by which tranſcript it does appear, that ſeveral goods and chattels of the ſaid *William White* were ſeized into his majeſty's hands by Barnard Turner, eſq. and Thomas Skinner, eſq. then ſheriff of the ſaid county of Middleſex, by virtue of a ſpecial *capias utlagatum*, in the ſaid tranſcript ſpecified: And I further certify, that a writ of *venditioni exponas* has iſſued, for ſelling the ſaid goods and chattels ſo ſeized, whereon the ſaid ſheriff hath returned, that he hath ſold the ſame for the ſum of fifty pounds."

Affidavit.

William White, plaintiff,
and
Benjamin Black, defendant.

In the king's bench.

William White, of, &c. maketh oath and ſaith that the above named *Benjamin Black* is juſtly and truly indebted unto this deponent, in the ſum of one

one hundred pounds, according to the annexed account, and also in the further sum of thirty pounds for costs paid to Mr. *A. B.* this deponent's solicitor in prosecuting the outlawry in this cause, against the said *Benjamin Black.*

If the inquest finds the outlaw possessed of lands, the parcels, tenure, and annual value beyond reprizes, must be set forth with convenient certainty; and then, by writs of *levari facias* from the exchequer to levy the profits; and then writs of *vendi-oni exponas* to sell those profits; the plaintiff may, on petition to the treasury, have the money so received.

But if the defendant hath a freehold interest in the lands (a term for years may be sold by a *vendi-oni exponas*) and doth not reverse the outlawry; and there is no incumbrance prior to the inquisition, the plaintiff may obtain a lease from the exchequer, or a grant under the privy seal; but the obtaining a lease, which costs about twenty-five pounds, is the last expence.

On petitioning the treasury for the lease, stating the debt and proceedings as before, the secretary takes out a warrant for a particular of the parcels and value of the lands as found by the inquest, to the remembrancer of the exchequer, which is certified by the deputy remembrancer; on which the secretary will grant a warrant for a lease, which is made out at the pipe office.

If the tenants will not attorn and pay the rents to the lessor, he may sue out writs of *levari facias* to levy the same, which the court of exchequer will, on motion and production of the lease, order to be paid over to the lessee.

The sheriff under a *levari*, or plaintiff under a lease, must not take more than the value extended by the inquest; but if the inquest should undervalue the lands, or all the lands and effects should not be at first discovered, a writ of *melius inquirendum* may go from the exchequer, upon which the sheriff must summon another inquest.

No perſon who ſhall be outlawed in a civil ſuit, ſhall be compelled to come into, or appear in perſon in this court, to reverſe ſuch outlawry, but ſhall or may appear by attorney, and reverſe the ſame without bail in all caſes (except where ſpecial bail ſhall be ordered by the ſaid court); and if any perſon be outlawed and arreſted upon any *capias utlagatum*, it ſhall be lawful for the ſheriff (in all caſes where ſpecial bail is not required) to take an attorney's engagement, under his hand, to appear for the ſaid defendant to reverſe the ſaid outlawry and thereupon to diſcharge the defendant from ſuch arreſts. And in thoſe caſes where ſpecial bail is required by the ſaid court, the ſaid ſheriff ſhall and may take ſecurity of the defendant, by bond, with one or more ſureties, in double the ſum, for which bail is required, and no more, for his, her, or their appearance, by attorney in the ſaid court, at the return of the ſaid writ, and do and perform ſuch things as ſhall be required by the ſaid court; and after ſuch bond taken ſhall diſcharge the defendant from ſuch arreſt.

If any perſon or perſons ſhall not be able within the return of ſuch writ to give ſecurity as aforeſaid, (in caſes where ſpecial bail is required), ſo as he or they are committed to gaol for default thereof, whereſoever the ſaid priſoner or priſoners ſhall find ſufficient ſecurity for his or their appearance, to the ſheriff, by attorney, at ſome return of the term, the next following, to reverſe the ſaid outlawry, and do and perform ſuch other thing and things as ſhall be required by the ſaid court, ſuch ſheriff ſhall diſcharge the defendant out of priſon." 4 & 5 *W. M. c.* 18.

Of ſuperſeding the exigent.

In order to ſuperſede the *exigent* before outlawry a note muſt be had of the ſheriff to whom it is directed, ſpecifying at whoſe ſuit it iſſued, the cauſe of action and return, from which the filazer will, on the defendant's entering an appearance, make out a *ſuperſe-*

ſuperſedeas, which muſt be taken to the ſheriff before the return of the exigent for his allowance, which he returns upon the writ, thus;

"I have altogether ceaſed from executing this writ, having received his majeſty's writ of *ſuperſedeas* for that purpoſe.

The anſwer of
Barnard Turner,
Thomas Skinner, } ſheriff.

If the defendant ſuperſedes the exigent before he is outlawed, no bail is required; but if he ſuperſedes, or reverſes an outlawry had againſt him, he muſt put in bail if the proceedings were by an original requiring bail.

In ſuperſeding the exigent, the defendant muſt pay coſts to the plaintiff.

Entering appearance 2*s.* *ſuperſedeas* 3*s.* ſealing 7*d.* duty 2*s.* 6*d.* allowance by the ſheriff 2*s.* 4*d.*

If bail is required, two days notice muſt be given of the names and places of abode of the bail, and of the time of juſtifying.

Filazer, if bail put in at Weſtminſter, 1*l.* at chambers 16*s.* 6*d.* and for juſtification 7*s.* 6*d.* court fees 9*s.* rule for the allowance of the bail 5*s.* As ſoon as bail is complete the filazer makes out the *ſuperſedeas*, which is delivered to the ſheriff, to return the allowance.

If the defendant is driven to his writ of error to reverſe the outlawry, either upon his coming in *gratis* upon the *exigent*, or being brought in upon the *capias utlagatum*, he muſt pay the plaintiff his coſts to the outlawry; and where ſpecial bail is required muſt put in bail, either before error can be brought, or upon the reverſal of the outlawry.

In caſe error be brought for want of proclamation, bail muſt be put in before the allowance, not only to appear and anſwer the plaintiff in the former ſuit, in a new action to be commenced by him for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin the

ſuit before the end of two terms, after allowance of the writ of error, or otherwiſe avoiding of the ſaid outlawry. 31 *Eliz. c.* 3. *ſ.* 3."

If a defendant was arreſted upon a *capias utlagatum*, the ſheriff could not admit him to bail, as an outlawed perſon is excepted out of the ſtatutes 23 *Hen.* 6. *c.* 9. and 13 *Car.* 2. *ſt.* 2. *c.* 2. but now *vide* the 4 & 5 *W.* & *M. c.* 18. *ſ.* 4 & 5. before ſet forth, and the bail is to be ſpecial or common in this as in other caſes. *Salk.* 496.

The defendant was outlawed in a perſonal action, without any affidavit, and aſſigned for error, being beyond ſea at the time of the outlawry, the plaintiff inſiſted on ſpecial bail, having now made the proper affidavit; the court, on conſidering the ſtatute were of opinion that they had a diſcretionary power, and that the want of an affidavit before was no objection, becauſe that is only to warrant an arreſt, and here was one in time for the new action that muſt be brought; and although the 31 *Eliz. c.* 3. *ſ.* 3. is the only act which requires bail, it is not to be inferred that it may not be inſiſted on in other caſes. *Sercold* v. *Hampſon*, *Bart. Stra.* 1178. 1 *Wilſ.* 3.

In civil caſes the court will generally reverſe an outlawry, upon motion, without forcing the party to a writ of error, whether he comes in the ſame term or another, or upon the *exigent*, or *capias utlagatum*; but in relieving by motion, the court will always advert to the plaintiff's cauſe of action; and the ſituation in which he is towards the recovery of his debt.

To reverſe an outlawry without a writ of error, the defendant's attorney having entered an appearance, gets a copy of the *exigent*, on which is marked the error, which being pointed out to the ſecondary, and ſhewn to a judge in court, or at chambers, a certificate is made in court, or an order at chambers, for the reverſal; on ſight of which the clerk of the outlawries marks the outlawry book, "diſcharged;" and then the reverſal is drawn up on paper and entered upon the roll; but if the body, lands or goods are taken, the attorney muſt go to the clerk of the

errors

errors; and, on putting in ſpecial bail, if requiſite, he will make out a *ſuperſedeas* to diſcharge the perſon or effects, if taken; or if not taken, for the ſheriff to forbear. An outlawry, after judgment, cannot however be reverſed until the plaintiff hath acknowledged ſatisfaction on record, or the defendant hath paid the money into court.

If the defendant is driven to his writ of error it is made out by the curſitor, and after it is allowed on motion, the rule is taken to him. If the plaintiff does not appear and confeſs the errors, the defendant muſt ſue out a *ſcire facias ad audiendum errores*, and upon *two nihils* returned, the court will reverſe the outlawry of courſe; but if he does come in, and does not confeſs the errors aſſigned, but joins in error, the defendant muſt make up the error-books, and go to argument and judgment as in other caſes of error.

If any action ſhall be brought by original, and the defendant therein be outlawed, and ſhall after reverſe the outlawry, in all ſuch caſes the plaintiff, his heirs, &c. may commence a new action or ſuit, from time to time, within a year after ſuch judgment reverſed but not after. 21 *Ja.* 1. *c.* 16. *ſ* 4.

Bail were formerly held to be anſwerable for the debt, upon a *capias utlagatum*, but now they may render the defendant, upon a late determination.

Upon ſuperſeding the exigent, the plaintiff delivers a declaration, and gives a rule to plead as in other caſes: the like after outlawry complete, and upon the ſame terms of pleading as in common caſes.

If a perſon procures another to be outlawed clandeſtinely, who appears openly and in public, the court will, on motion, oblige ſuch perſon who procures the outlawry, to reverſe the ſame at his own coſts; but if it appears that the party outlawed had lurked backward and forward, between two counties, and that the perſon procuring the outlawry had dealt openly, and had been regular in ſending down the proclamations to the ſheriff of the county where he ſometimes reſided, the court will not interpoſe in this ſummary manner, but leave the party to his ordinary remedy

remedy by plea or writ of error. 2 *Vent.* 46. 2 *Jon.* 211. *Comb.* 19. 2 *Salk.* 499.

Outlawry in civil ſuits determines by the death of the party, and the repreſentatives ſhall have reſtoration of the lands ſeized, or the effects, if they remain in the ſheriff's hands; but although outlawry determines upon the death of the outlaw, the death muſt be pleaded, and judgment thereon entered up in the exchequer, on the plea being confeſſed by the attorney-general. And if outlawry be any otherwiſe reverſed, which muſt be done in the court where the action was brought, a certificate of the reverſal muſt be pleaded and confeſſed; and judgment thereon entered in the exchequer before the king's hands can be amoved.

To reverſe an outlawry upon death, there muſt be a certificate of the death and burial from the miniſter of the pariſh where the defendant died, or was buried; and an affidavit of the ſame from ſome perſon who knew the party; in which affidavit the deſcription ſhould be the ſame as in the outlawry; and to diſcharge the ſheriff the judgment roll muſt be taken to the pipe office for a *quietus*.

Chap. XXXIX.

Of the writ of Habeas Corpus.

THE *habeas corpus ad faciendum et recipiendum*, uſually called an *habeas corpus cum cauſa*, of which only it is neceſſary to treat in this work, is grantable at all times of common right, whether in term or vacation

Proceedings to remove a priſoner from the cuſtody of the ſheriff into that of the marſhal of the king's bench.

If the defendant be detained on a writ out of the common pleas, and wiſhes to go to the king's bench priſon

priſon, a writ muſt be ſued out of this court for 10 *l.* or upwards, to ground the *habeas corpus*; in that caſe an affidavit is made of the debt, and a writ ſued out and left with the *habeas corpus*, at the ſheriff's office.

If in cuſtody in an inferior juriſdiction, as the ſheriff's court of London, &c. he may, on a like writ ſued out in this court, be removed to the cuſtody of the marſhal.

But if in cuſtody, upon a writ iſſued out of this court, an *habeas corpus* may be ſued out in the firſt inſtance, and left with the ſheriff.

The writ of *habeas corpus* is on a 5*s.* ſtamp, in the following form:

George, &c. to the ſheriffs of London, greeting. We command you, that you have the body of *Benjamin Black* detained in our priſon under your cuſtody, as it is ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name he ſhall be called in the ſame, before our right truſty and well beloved *William* earl Mansfield, our chief juſtice aſſigned to hold pleas in our court before us, at his chambers, ſituate in Serjeant's Inn, Chancery-lane, immediately after the receipt of this writ, to do and receive all and ſingular thoſe things, which our ſaid chief juſtice ſhall then and there conſider of him, in this behalf, and have there then this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way*.

C. D. attorney.

Præcipe.

London, *habeas corpus* for *Benjamin Black* to do and receive returnable immediately. *C. D.*

Signed by the ſigner of the writs, ſigning 6*s.* 8*d.* if in term, if in vacation 7*s.* 8*d.* ſealing 7*d.* If the action is in London, it is to be taken to the ſheriff's office in

in the Poultry or Wood-ſtreet; if in Middleſex, to the ſheriff's office in Took's Court, Curſitor Street.

Though this writ is returnable before the chief juſtice, yet any other of the judges may commit the priſoner to the king's bench.

When the ſheriff has returned the writ, an officer is to take the defendant to a judge's chambers, who will then commit him to the king's bench priſon, officer 10*s.* 6*d.* tipſtaff 10*s.* 6*d.* judges clerk, 8*s.* 6*d.*

If the *habeas corpus* be in Middleſex or London, the ſheriff is paid 9*s.* 4*d.* for the firſt action, 2*s.* 4*d.* for every other; and if the defendant is in Newgate, 2*s.* 4*d.* for the warrant to deliver.

If it be from the palace court, 5*s.* is paid for allowance, and 4*d.* for the *jurat*.

The form is the ſame in all other counties, but directed to the ſheriff, in whoſe cuſtody the defendant is.

If the defendant is to be removed from the country, the ſheriff is paid 1*s.* *per* mile for bringing him to town, and the judge will not (it is ſaid) commit the defendant, unleſs the ſum is paid; but the officer muſt obey the writ, though the priſoner refuſe to pay his fees, for he has another remedy for them. *Hopman* v. *Barber*, 2 *Str.* 814.

A defendant being in cuſtody of the ſheriff of Briſtol, brought his *habeas corpus* to be removed to the Fleet, and tendered it to the ſheriff with ſeven guineas (exceeding 1*s.* *per* mile) which the ſheriff refuſed to accept, inſiſting on ten pounds. The defendant moved for an attachment againſt the ſheriff, the rule for which was, on ſhewing cauſe, made abſolute. *Barnes* 377.

Every priſoner who ſhall be committed to the cuſtody of the marſhal of this court, by virtue of any writ of *habeas corpus* or *ad reſpondendum ad faciendum et recipiendum* ſhall remain in actual cuſtody of the ſaid marſhal by the ſpace of two days, next after ſuch committal of ſuch priſoner to the ſaid marſhal, notwithſtanding any other writ of *habeas corpus* iſſuing out

out of any other court to the ſaid marſhal delivered and allowed." *R. Hil. 5 W. & M.*

The proceedings to remove the cauſe from the inferior courts.

It was formerly very often the practice for the defendant in an action in an inferior court to ſue out an *habeas corpus cum cauſa*, and when iſſue was joined, and the plaintiff had actually produced the evidence to produce the writ, and ſtop all further proceedings, by which trick the defendant obtained a knowledge of the evidence which could be produced by the plaintiff, and was from thence the better enabled to make his defence, but now it is enacted,

That no writ of *habeas corpus*, or other writ ſued out of any court of record at Weſtminſter, to remove any action, &c. depending in any inferior court having juriſdiction thereof, ſhall be received or allowed, except delivered to the judges or officers of the court, before the jury which is to try the cauſe in queſtion, and the party that ſued forth the writ have appeared, and one of the ſaid jury ſworn to try the ſaid cauſe. 43 *Eliz. c.* 5.

That no writ of *habeas corpus*, &c. to remove any action or ſuit, commenced in any inferior court, ſhall be allowed, unleſs delivered before iſſue or demurrer joined, within ſix weeks next after the arreſt or appearance of the defendant.

That no cauſe, if once remanded to the inferior court by writ of *procedendo* or otherwiſe, ſhall ever afterwards be again removed.

That this act ſhall only extend to ſuch inferior courts, in which the judge or his aſſiſtant ſhall be an utter barriſter of three years ſtanding at the bar, and there preſent, and not of counſel in any action or ſuit there depending. 21 *Jac.* 1. *c.* 23.

That no cauſe, not concerning any freehold or inheritance, or title of lands, leaſe, or rent, ſhall be removed at all, if the debt or damages laid in the declaration do not amount to the ſum of 5*l.*

That the inferior court may proceed in ſuch actions as are under the value of 5*l.* notwithſtanding other actions may be brought againſt the ſaid defendant to a greater amount. 12 *Geo.* 1. *c.* 29. *ſ.* 3.

That no cauſe, where the cauſe of action ſhall not amount to the ſum of ten-pounds or upwards, ſhall be removed or removeable into any ſuperior court, by any writ of *habeas corpus*, or otherwiſe, unleſs the defendant who ſhall be deſirous of removing ſuch cauſe, ſhall enter into recognizance for the payment of the debt and coſts, in caſe judgment ſhall paſs againſt him.

"That in all caſes where final judgment ſhall be obtained in any action or ſuit in any inferior court of record, it ſhall and may be lawful to and for any of his majeſty's courts of record at Weſtminſter, upon affidavit made and filed therein, of ſuch judgment being obtained, and of diligent ſearch and inquiry having been made after the perſon or perſons of the defendant or defendants, or his, her, or their effects, and of execution having iſſued againſt the perſon or perſons, or effects of the defendant or defendants, and that the perſon or perſons or effects of the defendant or defendants, are not to be found within the juriſdiction of ſuch inferior courts, which affidavit may be made before a judge or commiſſioner to cauſe the record of the ſaid judgment to be removed into ſuch ſuperior court, and to iſſue writs of execution thereupon to the ſheriff of any county, city, liberty or place, againſt the perſon or perſons, or effects of the defendant or defendants, in the ſame manner as upon judgments obtained in the ſaid courts at Weſtminſter; and the ſheriff, upon every ſuch execution, ſhall and he is authoriſed to detain the defendant or defendants, until the ſum of twenty-ſhillings be paid to him, or levy the ſame out of the effects, according to the nature of the execution, for the extraordinary coſts of the plaintiff or plaintiffs in the inferior court, ſubſequent to the ſaid judgment, and of the execution in the ſuperior court, over and above the money for which ſuch execution ſhall be iſſued.

That

That no execution ſhall be ſtayed or delayed upon, or by any writ of error, or *ſuperſedeas* thereon to be ſued, for the reverſing of any judgment given, or to be given in any inferior court of record, where the damages are under ten-pounds, unleſs ſuch perſon or perſons, in whoſe name or names ſuch writ of error ſhall be brought, with two ſufficient ſureties, ſuch as the court (wherein ſuch judgment is or ſhall be given) ſhall allow of, ſhall firſt, before ſuch ſtay made, or *ſuperſedeas* to be awarded, be bound unto the party for whom any ſuch judgment is or ſhall be given by recognizance, to be acknowledged in the ſame court in double the ſum adjudged to be recovered by the ſaid former judgment, to proſecute the ſaid writ of error, with effect, and alſo to ſatisfy and pay (if the ſaid judgment be affirmed, or the ſaid writ of error be *nonproſſed*) all and ſingular the debt, damages, and coſts, adjudged, or to be adjuded, and all coſts and damages to be awarded for the ſame delaying of execution. 19 *Geo* 3. *c.* 70.

Habeas corpus *to remove the cauſe.*

George the third, &c. To the ſheriffs of London, greeting: We command you that you have the body of *Benjamin Black*, detained in our priſon under your cuſtody, as it is ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name he ſhall be called in the ſame, before our right truſty and well-beloved William Earl Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us, at his chambers ſituate in Serjeant's inn, Chancery-lane, immediately after the receipt of this writ, to do and receive all and ſingular thoſe things, which our ſaid chief juſtice ſhall then and there conſider of in this behalf, and have then there this writ. Witneſs, *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way*.

Præcipe.

London, *Habias Corpus*, for *Benjamin Black*, to do and receive returnable immediately.

C. D. attorney.

To bear *teste* in term, pay ſigning, in term, 6*s.* 8*d.* in vacation, 7*s.* 10*d.* ſeal 7*d.* It is then to be taken to the office where the action is entered, if but one cauſe, and above 10*l.* paying 4*s.* 10*d.* for the allowance, fee to the judge, 2*s.* 4*d.*

If an *habeas corpus* be brought to remove a cauſe out of the inferior court, under 10*l.* then bail muſt be put in, and two days notice *excluſive* given for their coming into the court below, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of inquiring into their ſufficiency, and upon their entering into a recogniſzance, before the judge, for the payment of the debt and coſts, then the judge will order the allowance of the writ.

Upon the bail being allowed in the court below, the plaintiff's attorney, is to apply to a judge of the court where the cauſe is removed, for a rule for the defendant to put in bail thereon within four days in term, if in vacation, ſix days, paying for ſame in term, 1*s.* in vacation, 2*s.* a copy of the rule is to be ſerved on the defendant's attorney, and if he does not put in bail within the four or ſix days next after ſervice, nor take out a ſummons for time to put in bail, then the plaintiff may iſſue out a writ of *procedendo*. R. H. 10 W. 3. R. Mich. 16 Car. 2.

But if he put in bail, then he muſt apply to the ſheriff for a return to the *habeas corpus*, for until that be returned no bail can be put in, *R. M.* 1651. *Hil.* 10 *W.* 3. as it is may appear what the cauſes are, for which defendant is detained.

Therefo

Therefore when the *habeas corpus* is returned, a bail-piece is to be annexed thereto in this form.

Trinity Term, in the 23d year of the reign of king *George* III. *Stormont* and *Way*.

London, to wit. } *Benjamin Black* is delivered on bail upon a *habeas corpus*.

To *Richard Red*, of *Cornhill*, *London*, linen-draper,
and
Bartholomew Brown, of *Cheapside*, *London*, goldsmith.

C. D. attorney.
At the suit of the plaintiff
in the plaint.

The *habeas corpus* is then taken with the bail to a judge's chambers, where they enter into the following recognizance, if the cause of action be above ten pounds.

You do jointly and severally undertake, that if the defendant be condemned at the suit of the plaintiff or plaintiffs in the plaint, that he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the Marshalsea of the court of king's bench, or you will do it for him, *R. T.* 8 *W.* 3. paying in term 4*s.* in vacation 6*s.* notice is to be given forthwith to the plaintiff's attorney, of the names and addition of the bail, the time when, and the judge before whom the same is put in. *R. M.* 1654. *f.* 8.

If the cause of action be under ten pounds, bail must be put in according to the directions of the statute 19 *Geo.* 3. *c.* 70. before set forth.

Notice

Notice of bail.

In the king's bench. *William White*, plaintiff,
and
Benjamin Black, defendant.

Take notice, that ſpecial bail was this day put in, upon the *habeas corpus* in this cauſe, before the honourable Mr. Juſtice - at his chambers in Serjeant's inn, Chancery-lane, London, and the names are, *Richard Red*, of Cornhill, London, linen-draper, and *Bartholomew Brown*, of Cheapſide, London, goldſmith. Dated, &c.

Yours, &c.

C. D. defendant's attorney.

To Mr. *A. B.* attorney for the plaintiff.

The plaintiff's attorney may, inſtead of entering an exception, (as in common caſes) apply to the judge for a rule for better bail, which is returnable within four days next after ſervice, a copy of which is to be ſerved on the attorney for the defendant; if the bail do not juſtify within the four days (provided there are four days in the term left) then a *procedendo* may be ſigned; but if there are not four days in term, then the defendant muſt give notice to juſtify the firſt day of the next term, before the rule expires, and juſtify on that day.

If the plaintiff does not take out a rule for better bail, within twenty-eight days after the putting in thereof, then the bail-piece ſhall be filed by the defendant's attorney, within four days next after the end of the twenty-eight days, under the penalty of 5*s.* to the box, *R. M.* 16 *Car.* 2. and for the ſecond offence he ſhall be ſtruck off the roll.

Notice

Notice of juſtification.

William White, plaintiff.
In the king's bench. and
Benjamin Black, defendant.

Take notice, that the bail already put in for the defendant in this cauſe, upon the writ of *habeas corpus*, and of whom you have had notice, will, on next, juſtify themſelves in open court, Weſtminſter-hall, in the county of Middleſex, as good bail for the ſaid defendant. Yours, &c.

C. D. defendant's attorney.

To Mr. *A. B.* attorney for the plaintiff.

This notice muſt be given two days excluſive of the day of juſtification, and the defendant may add to the bail already put in, new bail, and juſtify as in other caſes; an affidavit is to be made of the ſervice thereof, and a brief given to counſel to move to juſtify; fee 10*s.* 6*d.* court fees 9*s.* 6*d.* rule for allowance 5*s.* a copy of which muſt be ſerved on the plaintiff's attorney.

The bail are liable to all actions mentioned in the return of the *habeas corpus*, wherein the plaintiff ſhall declare within two terms, *R. Hil.* 2 *Jac.* 2. And if there be more cauſes than one returned in the *habeas corpus*, bail muſt in that caſe be put in for the whole, *Salk.* 352.

The defendant cannot ſign *nonpros* for want of declaration, he not being bound to follow the defendant, *Rule, Hil.* 2 *Jac.* 2.

After defendant has juſtified his bail, the plaintiff may declare in chief, or he may declare *de bene eſſe*, as ſoon as bail is put in above, and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*, Salk. 352. But ſuch declaration muſt be delivered within two terms. *R. Mich.* 16 *Car.* 2. And the defendant is not bound to plead to a declaration afterwards. *Ibid.*

The

The declaration is as in the cuſtody of the marſhal.

If a cauſe be removed by *habeas corpus*, out of the courts of Canterbury, Southampton, Hull, Litchfield, or Pool, or other counties where the judges of *niſi prius* ſeldom go, and the action be tranſitory, it muſt be laid in the county wherein ſuch city or town is, as Kent, Southampton, York, Stafford, or Dorſet. *R. M.* 1654. *ſ.* 9.

The defendant has no imparlance allowed him upon a *habeas corpus*, although the declaration be not delivered in time.

The writ of *habeas corpus* immediately ſuſpends the power of the inferior court, and if they proceed afterwards the proceedings are void as *coram non judice*. 1 Salk. 352. Cro. Car. 261. 2 Jones 209. 2 Mod. 195.

The record itſelf is not removed by *habeas corpus* as it is by *certiorari*, but the return is only an hiſtory of the proceedings.

If an *habeas corpus* is directed to an inferior court, and the ſteward hath liberty to proceed under the 21 *Jac.* 1. *c.* 23. yet the writ muſt be returned with the ſpecial matter, or the party to whom it is directed will be in contempt. *Carth.* 69.

Of the writ of procedendo.

If the defendant who hath removed a ſuit commenced againſt him by *habeas corpus*, doth not comply with the ſtatutes and rules of court, made to regulate the proceedings in ſuch caſes, ſuch as not putting in ſpecial bail where required, not juſtifying bail, or not pleading in due time, &c. the plaintiff may remand the cauſe to the inferior juriſdiction, by writ of *procedendo*, which is grantable at chambers by any judge of the court into which the cauſe was removed.

Writ

Writ of procedendo.

George the Third, &c. To the ſheriffs of London, greeting. Although we lately by our writ commanded you that you ſhould have the body of *Benjamin Black* detained in our priſon under your cuſtody, as it was ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name the ſaid *Benjamin Black* might be called in the ſame, before our right truſty and well beloved *William* earl Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us, at his chambers in Serjeant's-inn, Chancery-lane, immediately after the receipt of that writ, to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhould then and there conſider of him in that behalf; yet we being now moved with certain cauſes in our court before us, command you, and every of you, that in all plaints and ſuits againſt the ſaid *Benjamin Black*, at the ſuit of *William White*, in our court before you, or any of you, now depending undetermined, you proceed with what ſpeed you can, in ſuch manner, according to the law and cuſtom of our kingdom of England, as you ſhall ſee proper, our ſaid writ to you firſt thereupon directed to the contrary in any wiſe notwithſtanding. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty third year of our reign,

Stormont and *Way*.

Præcipe.

London, *Procedendo* for *William White* againſt *Benjamin Black*. *A. B.* attorney.

Signing 5*s*. 8*d*. ſealing 7*d*. allowing 6*s*. 10*d*.

On filing the *procedendo* in the court to which it is directed, it inſtantly reſumes the juriſdiction of the cauſe, which can never after be removed before

judgment; and as the *habeas corpus* removes all the cauſes that were in the court againſt the defendant, the *procedendo* remands them all.

The writs of *habeas corpus* and *procedendo* muſt be properly directed to the judges or officers of the inferior court.

The *habeas corpus ad ſatisfaciendum* muſt be ſued out when a priſoner has removed himſelf after declaration to the Fleet priſon, in order to charge him in execution upon judgment obtained, on which the court commits him again to the cuſtody of the marſhal, there to remain until he makes ſatisfaction.

This writ is always returnable on a day certain in term, as the priſoner cannot be committed in execution but during the ſitting of the court.

Habeas corpus ad ſatisfaciendum *in caſe.*

George, &c. To the warden of the priſon of the Fleet, greeting: We command you, that you have before us at Weſtminſter, on next, after the body of *Benjamin Black*, detained in our priſon under your cuſtody as we are informed, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained by whatſoever name the ſaid *Benjamin Black* is there known, to ſatisfy *William White* fifty pounds for his damages, which he ſuſtained, as well by the not performing certain promiſes and undertakings lately made by the ſaid *Benjamin* to the ſaid *William*, at Weſtminſter, in the county of Middleſex, as for his coſts and charges, by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record, and further to do and receive what our ſaid court beſides us ſhall then and there conſider of him in that behalf, and have you then there this writ. Witneſs *William* earl Mansfield, &c.

Stormont and *W*

Hab

Habeas corpus ad ſatisfaciendum *in debt*.

George, &c. To the warden of the priſon of the Fleet, greeting: We command you, that you have before us at Weſtminſter, on next, after the body of *Benjamin Black*, detained in our priſon under your cuſtody as we are informed, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained. To ſatisfy *William White*, as well a certain debt of fifty pounds, which the ſaid *William*, in our court, before us at Weſtminſter, recovered againſt the ſaid *Benjamin*, as alſo ten pounds for his damages which he ſuſtained by reaſon of the detaining the ſaid debt, as for his coſts, and charges by him laid out, about his ſuit, in that behalf, whereof the ſaid *Benjamin* is convicted, as appears to us of record, and further to do and receive what our ſaid court before us, ſhall then and there conſider of him in this behalf, and have there then this writ. Witneſs, *William* earl Mansfield, &c.

Stormont and *Way*.

Signing 7*s*. 6*d*. ſealing 7*d*. This writ is to be lodged with the warden of the Fleet. On the day of the return the defendant is brought up, and, on application to one of the judge's clerks, he will make out the commitment; the warden muſt be paid his fee for return and bringing up, tipſtaff 10*s*. 6*d*. judge's clerk, 4*s*. the judge's clerk takes the *habeas corpus* into court with the defendant, and the maſter commits him.

An *habeas corpus* was ſued out to remove a cauſe out of London, and the plaintiff prayed a *procedendo*, becauſe the action was for calling her a whore, which is not actionable elſewhere, neither of the parties lived in London, nor were the words ſpoken there. *Per* Hale, ch. juſt. If the words were not ſpoken there, the plaintiff ſhall not have a *procedendo*, for the words may be made actionable any where by laying them in London. 2 *Roll. Abr.* 69.

An action againſt a *feme covert* as a ſole trader, cannot be removed by *habeas corpus* from the city courts. *Pope* v. *Vaux et ux*, *Eaſt.* 16 *Geo.* 3. *C. B.* 2 *Blackſt. Rep.* 1060.

Action in the ſheriff of London's court againſt two partners, one brought an *habeas corpus*, and put in bail for himſelf only, a *procedendo* was granted, otherwiſe the plaintiff could not proceed in either court. *Foy* v. *Corey*, *Stra.* 527.

If a cauſe be removed by *habeas corpus* out of the Marſhalſea, or other inferior court, (except London) and the bail below are bail above, the plaintiff cannot except, becauſe he did not except to them below; but otherwiſe in London, for there the bail is at the peril of the clerk; ſo that the plaintiff cannot except to them, and the clerk is not reſponſible for their deficiency in the court above, although he was ſo in London. *Salk.* 97.

There is no limited time for the plaintiff getting an order for a *procedendo*, unleſs bail be put in, *Barnes* 90. But if put in in time, and the plaintiff doth not declare in two terms, the cauſe is out of court.

Chap. XL.

Of proceedings in Ejectment.

THE ancient manner of trying the title to lands, &c. by real actions, required ſuch nicety, and was attended with ſo much expence, that the remedy by ejectment was contrived to ſupply the defects of that mode of proceeding; one evil of which was that in real actions the defendant could only recover his poſſeſſion, but not any damages for the detention, and if he was barred in one action he could not regularly bring another. 6 *Co.* 67.

Ejectment is a mixed action, in which the leſſee for years ſhall recover his term, and alſo his damages, 5 *Co.* 105. 9 *Co.* 77. It is real in reſpect of the lands, and perſonal in reſpect of the damages and coſts. *Comb.* 250.

Th

This mixed proceeding is now the common method of trying the title to lands and tenements.

The writ of covenant was formerly the ſpecific remedy for the leſſee to recover againſt the leſſor the term from which he had been by him ejected, and damages for the ouſter. But if ejected by a ſtranger claiming under a title ſuperior to the leſſor, though he had ſtill an action of covenant againſt the leſſor for non-performance of his contract, he could not by any means recover the term itſelf. If the ouſter was by a ſtranger without title, the leſſor might recover the freehold by a real action, but the leſſee had no other remedy againſt the ejector but in damages for the treſpaſs by a writ of *ejectione firmæ*, Fitz. Abr. *tit.* Eject. Term 2. But when the courts of equity began to oblige the ejector to make a ſpecific reſtitution of the land to the party immediately injured, thoſe of law adopted the ſame practice and introduced in ejectment a judgment to recover the term, and a writ of poſſeſſion, although not warranted by the writ, or prayed for in the declaration, which are calculated merely for the damages; this method, although ſaid to have begun under *Hen.* 7. *F. N. B.* 20. probably becauſe then firſt applied to its preſent common uſe, ſeems to have been ſettled in the time of *Edw.* 4. *Bro. Abr.* tit. *Quare ejecit infra term, c.* 6.

To comprehend the preſent mode of trying titles by ejectment (which at firſt ſight appears whimſical and even ridiculous) but which is conſidered as the fictitious form of an action really brought by the leſſor of the plaintiff againſt the tenant in poſſeſſion, invented under the controul and power of the court, for the advancement of juſtice in many reſpects, and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either ſide, as reſolved by all the judges, *Mich* 32 *Geo.* 2. 4 *Burr.* 668. it muſt be obſerved, that it is in its original an action brought by one who hath a leaſe for years to repair the injury done him by the ouſter.

To

To convert it therefore into a mode of trying the title to the freehold, the claimant must enter upon the land to constitute a lessee for years, that may be capable of being ousted; for it would be maintenance to convey a title to another, if the grantor be not in possession; and, indeed it was at first doubted, whether this occasional possession took away the legal guilt of maintenance. 1 *Ch. Rep. Append.* 39.

The claimant then is to make a formal entry upon the premisses, and while thus in possession, seal and deliver a lease for years to some third person; and having thus given him entry, leave him in possession, in which he is to stay until the prior tenant, or some other, either by accident or agreement, comes upon the land and ejects him, on which he is entitled to his action against the tenant, or the casual ejector, whichever it was that ousted him, to recover his term and damages; but no person can recover lands against a casual ejector without notice to the tenant in possession, if any; and making him, if he chuses, a defendant; and to maintain the action, the plaintiff must, in case of defence, make out the four points of *title*, *lease*, *entry*, and *ouster*, on which he shall have judgment to recover the term and damages, and a writ of possession to the sheriff to deliver him the peaceable possession of the term.

Thus the title of the lessor comes collaterally before the court, to shew the injury done the lessee by the ouster; and this method must be still continued where the possession is vacant, or there is no actual occupant of the premisses, and in some other cases.

But to save the trouble of an actual lease, entry and ouster, the lord chief justice of the upper bench *Rolle*, invented a new and more easy method of trying titles by ejectment, *Styl. Pract. Reg.* 108. in which the lease, entry, and ouster are merely ideal for the purpose of trying the title.

Thus the declaration states a lease for years to have been made from the person who claims title to the plaintiff in the action, as by *John Rogers* to *Richard Red*, which plaintiff ought to be a real; although no

now uſually a fictitious perſon, 6 *Mod.* 309. it alſo ſtates, that *Red* the leſſee entered, and that the defendant *William White*, a fictitious perſon, who is called the caſual ejector, ouſted him, for which ouſter the action is brought, which is done by ſerving the declaration on the tenant in poſſeſſion, under which is a written notice from the caſual ejector, informing the tenant that he claims no title to the premiſſes, and ſhall therefore make no defence; and therefore adviſing the tenant to appear and defend; or, that he, *White*, will ſuffer judgment to go againſt him, and the tenant, *Green*, will be turned out of poſſeſſion.

It is common to proceed by the original, as the defendant cannot then delay the plaintiff from obtaining poſſeſſion by writ of error, unleſs returnable in parliament. When the proceedings are by bill, they differ in the uſual circumſtances. [For the original writ, *vide* page 184.

The original is not uſually ſued out at firſt; but if a writ of error ſhould be brought, the original muſt be ſued out, returned by the ſheriff, and filed in the treaſury; and if the tenant has not appeared, the original muſt be ſued, returned, and filed properly; if he has appeared his name muſt be inſerted inſtead of the nominal defendant.

As many copies of the declaration muſt be made as there are tenants in poſſeſſion, and each muſt be perſonally ſerved on the tenant or his wife, before the eſſoign day of the term in which he is to appear, or the plaintiff cannot have judgment until the following term, *Barnes* 172. And the notice muſt be read over and fully explained, the ſervice, if on the tenant, may be off the premiſſes; but on the wife or ſervant, it muſt be on the premiſſes; and if on the ſervant, there muſt be ſome proof of its having come to the hands of the tenant. [For the declaration on a ſingle demiſe and notice, *vide* page 184, 185.]

Declaration by original on a double demiſe.

Berks, to wit. Hilary term the 23d year of king George the Third. *William White*, late of Newberry, in

in the county aforeſaid, yeoman, was attached to anſwer *Richard Red* in a plea, wherefore with force and arms he entered into one meſſuage, one orchard, one garden, &c. with the appurtenances, in the pariſh of Sutton in the ſaid county, which *John Rogers* demiſed to the ſaid *Richard Red*, for a term of years which is not yet expired; and alſo wherefore with force and arms he entered into one other meſſuage, one other orchard, one other garden, &c. with the appurtenances, in the pariſh of Sutton in the ſaid county, which *Thomas Stiles* demiſed to the ſaid *Richard Red* for a term which is not yet expired, and ejected him from his ſaid ſeveral farms, and other wrongs to him then and there did, to the great damage of the ſaid *Richard Red*, and againſt the peace of our lord the now king; and whereupon the ſaid *Richard Red* by *A. B.* his attorney, complains, that whereas the ſaid *John Rogers*, on the fifth day of January, in the year of our lord one thouſand ſeven hundred and eighty four, at the pariſh of Sutton aforeſaid, in the county aforeſaid, had demiſed to the ſaid *Richard Red* the ſaid tenements firſt above mentioned, with the appurtenances, to have and to hold the ſaid tenements firſt above mentioned, with the appurtenances, to the ſaid *Richard Red* and his aſſigns, from the ſaid fifth day of January in the year laſt aforeſaid, to the full end and term of ſeven years, from thence next enſuing, and fully to be compleat and ended, by virtue of which demiſe the ſaid *Richard Red* entered into the ſaid tenements firſt above mentioned to be demiſed, with the appurtenances, and was poſſeſſed thereof, and being ſo poſſeſſed thereof, he, the ſaid *William White* afterwards, to wit, on the ſaid fifth day of January, in the year aforeſaid, with force and arms, &c. entered into the ſaid tenements firſt above mentioned, with the appurtenances, which the ſaid *John Rogers* demiſed to the ſaid *Richard Red*, in manner aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *Richard Red* out of his ſaid farm, firſt above mentioned, and other wrongs to him did, to the great damage of the ſaid *Richard Red*, and againſt the peace of our lord the now king,

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and alſo whereas the ſaid *Thomas Stiles* on the fifth day of January, in the year of our lord one thouſand ſeven hundred and eighty four, at the pariſh of Sutton aforeſaid in the ſaid county, had demiſed to the ſaid *Richard Red* the tenements aforeſaid, ſecondly above mentioned, with the appurtenances, to have and to hold the ſaid tenements ſecondly above mentioned to be demiſed, with the appurtenances to the ſaid *Richard Red* and his aſſigns, from the fifth day of January, in the year laſt above mentioned, to the full end and term of ſeven years, from thence next enſuing, and fully to be compleat and ended, by virtue of which laſt mentioned demiſe the ſaid *Richard Red* entered into the ſaid tenements ſecondly above mentioned, to be demiſed, and was poſſeſſed thereof with the appurtenances, and being ſo poſſeſſed thereof, he, the ſaid *William White*, afterwards, to wit, on the ſaid fifth day of January, in the year laſt above mentioned, with force and arms, &c. entered into the ſaid tenements, with the appurtenances, laſt above demiſed to the ſaid *Richard Red*, in and upon the poſſeſſion of the ſaid *Richard Red*, his ſaid term therein not being yet expired, and ejected the ſaid *Richard Red* out of his ſaid farm laſt mentioned, and other wrongs, &c. to the great damages, &c. and againſt the peace, &c. whereupon the ſaid *Richard Red* ſays he is injured, and hath ſuſtained damage to the value of ten-pounds and therefore he brings ſuit, &c.

The notice is as before.

If the ejectment be of a manor, the deſcription of the parcels are thus: "entered into the manor of S in the ſaid county, with the rights, members, and appurtenances, thereunto belonging, and into 50 meſſuages, 50 cottages, 50 barns, 50 ſtables, 2 mills, 50 gardens, 50 orchards, 3000 acres of land, 3000 acres of paſture, 3000 acres of meadow, 1000 acres of wood, 500 acres of marſh land, 500 acres of furze and heath, and common of paſture for all manner of cattle, with the appurtenances, in the pariſh of Sutton in the ſaid county.

In this declaration the thing demanded muſt be ſo ſpecified, that the ſheriff may certainly know what

to give the poſſeſſion of, if the plaintiff ſhould recover, for it would be in vain if execution could not be had of the thing ſpecifically demanded. 2 *Ld. Raym.* 1470. 2 *Str.* 908.

It muſt be brought in that county where the lands lie, and the declaration muſt ſet forth the particular pariſh; and the day of the demiſe muſt be laid after the title accrues, otherwiſe the plaintiff will be non-ſuited, and the plaintiff muſt lay the commencement of of his ſuppoſed leaſe, to have been precedent to the ejectment by the defendant. 1 *Sid.* 8. 2 *New. Abr.* 171.

If the title of the leſſor of the plaintiff accrue in Eaſter vacation, yet the plaintiff may deliver his ejectment as of Eaſter term, and ſhall recover thereon, becauſe he makes up his iſſue, or takes judgment as of the next term, otherwiſe the act of the law which ſuppoſes the bill filed as of the firſt day of Eaſter term, before a title accrued to the plaintiff, would be an an act of injury to him and delay his right; for a man ejected out of a leaſe made in term time, would not complain till term was over. 2 *Vent.* 174.

An ejectment will not lie after 20 years. 21 *Jac.* 1. *c.* 16. *Sid.* 432.

If the premiſſes are in London or Middleſex, the notice muſt be to appear on the firſt day of the next term to that of which the declaration is entitled; for if to appear of that term generally, the defendant will have the whole of the term to appear in; but in any other county the notice muſt be general.

The notice was ſubſcribed by the nominal plaintiff, inſtead of the caſual ejector; on which the court diſcharged the rule for judgment. *Hil.* 2 *Geo.* 2.

The notice was to appear the eſſoign day, and held ill, for it ſhould be to appear the firſt day in full term. *Stra.* 1049.

If there be no actual tenant or occupier of the lands, (except in the caſe of landlord and tenant where the landlord has a right of re-entry, as upon a leaſe, where half a year's rent is left unpaid), the claimant muſt take poſſeſſion of the lands, by making a forma-

a formal entry thereon, to impower him to constitute a leſſee for years: and being on the land, ſeal and deliver a leaſe for years to ſuch leſſee, and having thus given him entry, leave him in poſſeſſion of the premiſſes. This leſſee is to ſtay upon the land, until ouſted as before ſtated.

An affidavit muſt be made of the ſealing of the leaſe, and the purport ſhortly ſet forth, and ſtating in what manner the defendant got the poſſeſſion given to, and the taking it from the leſſee, (who is made plaintiff), and how the declaration was delivered to the defendant; thus ſuppoſing *John Rogers* to be the perſon claiming title to the premiſſes, he may, by letter of attorney to impower *William Smith* to execute a leaſe in his name, of the premiſſes in queſtion, to *Richard Red*, which is done upon the premiſſes, *Smith* and *Richard Red* being only thereon, then *Smith* after having executed the leaſe to *Richard Red* leaves him in poſſeſſion of the premiſſes, who is turned out by *William White* to whom, while on the premiſes, ſome third perſon delivers a declaration in ejectment.

Letter of attorney.

Know all men by theſe preſents, that I *John Rogers* of, &c. eſquire, have made, ordained, conſtituted, and appointed, and by theſe preſents do make ordain, conſtitute, and appoint, *William Smith* of, &c. gentleman to be my true and lawful attorney, for me, and in my name, to enter into and take poſſeſſion of a certain meſſuage late in the tenure or occupation of ſituate and being in the pariſh of Sutton in the county of Berks, but now untenanted, and after the ſaid *William Smith* hath taken poſſeſſion thereof, for me, and in my name, and as my act and deed, to ſign, ſeal, and execute a leaſe of the ſaid premiſes, with the appurtenances, unto *Richard Red* of the pariſh of, &c. to hold the ſame unto the ſaid *Richard Red* his executors, adminiſtrators, and aſſigns, from the day of laſt paſt, before the date thereof, for the term of ſeven years, at the yearly rent of a pepper-corn (if lawfully demanded) ſubject to a

proviſoe, to make void the ſame on payment by me of the ſum of ſix-pence to the ſaid *Richard Red*, In witneſs, &c.

Sealed and delivered &c.

The leaſe.

This indenture made, &c. between *John Rogers*, &c. eſquire, of the one part, and *Richard Red* of &c. of the other part, witneſſeth that the ſaid *John Rogers*, for and in conſideration of the ſum of 5*s*. of lawful money of Great Britain, to him in hand paid by the ſaid *Richard Red* at and before the ſealing and delivery of theſe preſents, the receipt whereof the ſaid *John Rogers* doth hereby acknowledge, hath demiſed, granted, and to farm let, and by theſe preſents doth demiſe, grant, and to farm let, unto the ſaid *Richard Red*, his executors and adminiſtrators, all that meſſuage, &c. ſituate and being in the pariſh of Sutton in the county of Berks, late in the poſſeſſion of but now untenanted, to have and to hold the ſaid meſſuage, and premiſes, hereby demiſed, with the appurtenances, from the day of laſt paſt, before the date hereof, for and during, and unto the full end and term of ſeven years, from thence next enſuing, and fully to be compleat and ended yielding and paying therefore yearly, and every year during the ſaid term, unto the ſaid *John Rogers*, or his aſſigns, the rent of one pepper-corn, if lawfully demanded, at the feaſt of provided always and upon this condition, that if the ſaid *John Rogers* ſhall at any time or times hereafter tender, or cauſe to be tendered unto the ſaid *Richard Red*, his executors or adminiſtrators, the ſum of ſix-pence, then this preſent indenture ſhall be void and of none effect, (any thing herein contained to the contrary in any wiſe notwithſtanding). In witneſs whereof the parties hereto have interchangeably ſet their hands and ſeals the day and year firſt above written.

Sealed and delivered as the act and deed of the above-named *John Rogers*, by *William Smith*, &c. gentleman, by virtue of a letter of attorney

ney to him for that purpoſe made by the ſaid *John Rogers*, bearing date the day of inſtant, being firſt duly ſtamped in the preſence of

The declaration is the ſame as others, only the plaintiff and defendant are in this caſe the real perſons; as for inſtance, *Richard Red*, the leſſee of the premiſſes will be plaintiff, and *William White*,, the defendant; *John Rogers* will be the leſſor of the plaintiff.

No notice is neceſſary under this declaration; but the plaintiff gives a rule to plead; and on no plea being put in in due time, ſigns judgment.

Affidavit of the entry, ſealing the leaſe and the ouſter by the defendant.

In the king's bench. *Richard Red*, plaintiff, and *William White*, defendant on the demiſe of *John Rogers*, eſq.

A. B. of, &c. gentleman, maketh oath and ſaith, that on the day of laſt, he did ſee *William Smith*, in the letter of attorney hereto annexed named, for and in the name of *John Rogers*, eſquire, the leſſor of the plaintiff, enter upon and take poſſeſſion of the meſſuage in the leaſe hereto alſo annexed mentioned, by putting his foot on the threſhold of the outer door thereof, the ſame being locked up and uninhabited, ſo that no other entry thereon could be made, or any other poſſeſſion thereof taken without force. And this deponent further ſaith, that he did, on the ſame day, ſee the ſaid *William Smith*, after ſuch entry made, and whilſt he ſtood on the threſhold of the ſaid door, duly ſign, ſeal, and deliver the leaſe hereunto annexed in the name of the ſaid *John Rogers*, and as his act and deed deliver the ſame unto the ſaid *Richard Red*, the plaintiff above named; and that after the ſaid leaſe was ſo executed, this deponent did ſee the ſaid *Richard Red* take poſſeſſion of the ſaid

ſaid meſſuage by virtue of the ſaid leaſe, by entering upon the threſhold of the ſaid outer door of the ſaid meſſuage, (the ſame being then locked and uninhabited) and no other entry to be made therein (ſave as aforeſaid), and that immediately afterwards the ſaid *William White*, the defendant, came and removed the ſaid *Richard Red* from the ſaid door, and put his foot on the threſhold thereof; whereupon this deponent did, on the day and year aforeſaid, deliver to the ſaid defendant *William White*, who ſtill continued upon the threſhold of the ſaid meſſuage, a true copy of the declaration of ejectment hereto annexed.

After this is ſworn, it is to be indorſed, "to move for judgment againſt the caſual ejector," and unleſs ſome perſon claiming do appear, and enter into the common rule, judgment may be ſigned.

Half a year's notice to quit poſſeſſion muſt be given to a tenant at will, before the end of which time an ejectment will not lie to turn the tenant out of the farm. *Parker ex dem. Walker* v. *Conſtable*, 3 *Wiſ.* 25. the ſame law was held in the caſe of an executor of a tenant at will. *Ibid.*

By the cuſtom of London if the premiſſes are above the yearly rent of 40*s.* half a year's notice muſt be given him to quit, if under 40*s.* a quarter's notice. 2 *Sid.* 20.

If there is a tenant in poſſeſſion after a declaration is delivered, an affidavit muſt be made of the ſervice, and the plaintiff may then move for judgment againſt the caſual ejector, for which purpoſe a counſel ſigns his name on the declaration, fee 10*s.* 6*d.* and it is then given to the clerk of the rules with the affidavit.

Affidavit of ſervice.

In the king's bench.

Richard Red on the demiſe of *John Rogers*, eſq. plaintiff, and

William White, defendant.

A. B. of in the county of gentleman, maketh oath and ſaith, that he, this deponent,

ponent, did on the day of last, perſonally ſerve *William White*, tenant, in poſſeſſion of the premiſſes in the declaration hereto annexed mentioned, with a true copy of the declaration and notice thereunder written hereto annexed, and at the ſame time this deponent acquainted the ſaid *William White* with the intent and meaning of the ſaid declaration, and notice thereunder written.

To be ſworn before a judge if a town cauſe, and a commiſſioner, if in the country, ingroſſed on a treble 6*d*. If the wife was ſerved, "ſerved the wife of *Richard Red*, the tenant in poſſeſſion of the premiſſes, &c."

If the premiſſes lie in London or Middleſex, and notice is given to appear the firſt day of term, the plaintiff may on that day move for judgment, and then the tenant has but four days incluſive to appear in, next after the motion; but if the motion is made late in term, the court will not allow him more than one or two days; and will ſometimes order the tenant to appear immediately ſo that plaintiff may give notice of trial within the term; but if not moved before the laſt four days, the tenant has until two days before the eſſoign day of the ſubſequent term to appear.

If the tenements lie in any other county than London or Middleſex, and the declaration be delivered before the eſſoign day of Eaſter or Michaelmas term, yet the tenant has four days after the end of the next iſſuable term, *viz*, Hilary or Trinity to appear; and if in a county where the aſſizes are held but once a year, yet the tenant has four days after the end of the term next preceding the aſſizes, to appear; and the motion will be time enough if made the laſt day of the iſſuable term.

If the term ends on a Wedneſday, the defendant has all Monday to appear in, and judgment cannot be ſigned till Tueſday afternoon.

It cannot be ſigned until the afternoon of the fifth day, after the end of the term of which the declaration is. *Say. Rep.* 303.

If the tenant does not appear, and file his plea within the time limited, (for which ſearch is to be made

made at all the judges chambers, each of whom keep an ejectment book) a rule for judgment is to be had from the clerk of the rules; rule 5s.

Then is entered on a double half-crown ſtamp paper, the memorandum, (if by bill, if by original, "the declaration only,") ſo far as the premiſſes, and on a roll, the warrants of attorney, as on other judgments, only ſaying, "in a plea of treſpaſs and ejectment," and on producing the rule for judgment, the clerk of the judgments will ſign it, and he will expect that common bail be filed, if by bill, (but not by original), ſigning judgment 4s. 2d. on which a writ of poſſeſſion may be ſued out.

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the moſt trivial matters, but it has ſince been held, that an ejectment is a mere fictitious action, and the demiſe mere matter of form, nor does it exiſt; and on application, the demiſe was ordered to be amended, but this was to ſave the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment, 4 *Burr.* 2447. *Burr.* 1162. therefore as the demiſe may be altered, there can be no doubt but that other parts leſs material may alſo be amended, the action being invented under the controul of the court, for advancement of juſtice, and merely to try the right in queſtion. 1 *Burr* 665.

If the tenant in poſſeſſion applies to be made defendant, it is allowed upon condition he enter into a rule of court, to confeſs at the trial of the cauſe three of the four requiſites, the leaſe of *Rogers* the leſſor, the entry of *Red*, and his ouſter by himſelf now made defendant inſtead of *White* the caſual ejector which being intirely fictitious, the plaintiff would, if put upon the proof thereof, be nonſuited but by the ſtipulated admiſſion of, which the trial will be of the title only; upon this the declaration is altered, by inſerting the name of *George Green* inſtead of *William White*; and the cauſe is tried under the name *Richard Red*, the nominal under the demiſe of *John Rogers*, the real plaintiff, againſt *George Green*

the actual defendant; upon which trial the leſſor of the nominal plaintiff is bound to make out a title, or the fictitious leſſee will not have judgment to have poſſeſſion of the land for the ſuppoſed term; but if the title is made out, judgment and a writ of poſſeſſion go for the nominal plaintiff.

And the tenant is by the ſame ſtatute, *ſ.* 12. to give notice to the landlord when ſerved with any declaration in ejectment, upon pain of forfeiting three years improved, or rack-rent of the premiſſes. [For the rule, *vide* page 186.]

If upon the trial of the cauſe the new defendant, whether tenant or landlord, or both, fail to appear or refuſe to confeſs leaſe, entry, and ouſter, the plaintiff, *Red*, muſt indeed be there nonſuited for want of proof of thoſe articles; but judgment will in the end, be entered againſt the caſual ejector, *White*, for the condition on which *Green*, or his landlord was made defendant, is broken; the ſame proceſs therefore as would have been had, if no conditional rule had been made, is now purſued; judgment is entered for the plaintiff, and the ſheriff, by virtue of a writ of poſſeſſion, turns out *Green* and delivers poſſeſſion of the premiſſes to *Red*.

As it may happen that a perſon may have title to a part only of the premiſſes mentioned in the declaration, it is ordered that on every action of treſpaſs and ejectment where the defendant, by the rule of court, ſhall confeſs leaſe, entry, and ouſter, for ſo much of the premiſſes in the declaration mentioned, as are in the poſſeſſion of the ſaid defendant, or his under-tenants, the attorney of ſuch defendant ſhall immediately deliver to the plaintiff's attorney a certain note in writing of the tenements ſo being in poſſeſſion of the ſaid defendant, or his under-tenants. *R.* 15 *Car.* 2.

The uſual way however is, to mention the premiſſes in the rule for which the party means to defend as, "part of the premiſſes mentioned in the declaration;" which will then run in this manner: unleſs *George Green*, tenant in poſſeſſion of part of the premiſſes in queſtion, ſhall appear and plead to

iſſue on ... let judgment be entered for the plaintiff againſt the now defendant, *William White*, by default. But execution ſhall iſſue for ſuch part of the premiſſes only as are in their reſpective poſſeſſions."

When the rule is filled up, the plea of the general iſſue of not guilty, is to be annexed thereto; and if the declaration be by bill, common bail filed in the ſame manner as if the defendant had been ſerved with proceſs, as originally, the plaintiff was obliged, before he ſigned judgment, to ſue out a writ of *latitat* againſt the caſual ejector, to ground his ejectment, *Mich.* 43 *Car.* 2. but now the writ is not ſued out, nor is there any rule to plead.

The clerk of the common bails marks the rule by conſent, which, and the plea, is then taken to one of the judge's chambers, and filed, paying 2*s.* filing common bail in term, 1*s.* 2*d.* in vacation 4*d.* more.

If the declaration be by original, the rule and plea are taken to the filazer, with a note of appearance, thus:

Middleſex, to wit. Appearance for *George Green* at the ſuit of *Richard Red*, on the demiſe of *John Rogers*, who ſigns the rule, and writes on it, "Appearance entered," it is then taken to one of the judge's chambers, and left there, paying 2*s.*

Plea:

Hilary term, in the twenty-third year of the reign of king George the Third.

Stormont and *Wa*

Red ats. *Green*, } And the ſaid *George Green*, *ex dem.* of *Rogers.* } *C. D.* his attorney, comes and defends the force and injury, when, &c. and ſays that he is not guilty of the treſpaſs and ejectment above laid to his charge, in manner and form as the ſaid *Richard Red* hath above thereof complained againſt him, and of this he puts himſelf upon the country, &c.

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Any perſon claiming right to the premiſſes in queſtion, may, with leave of the court, be made a defendant with the tenant in poſſeſſion, but the court never permits ſuch perſons to defend alone without the tenant.

If the tenant ſhall refuſe to appear and defend the ejectment, the landlord may move, that he may be made defendant with the tenant, if he appears, and if the tenant does not appear, then that he may appear by himſelf, and enter into the common rule, and defend his title. Counſel for his hand, 10*s.* 6*d.* The rule is drawn up at the clerk of the rules, paying 8*s.* and annexed to the plea; if the landlord defends with the tenant, (which he may if he pleaſes), the common conſent rule is added thereto, in which are inſerted, "both names," and appearances—or common bail filed, as the caſe requires.

Where the landlord is made defendant, the plaintiff muſt prove the defendant's tenant in poſſeſſion of the premiſſes. *Wilſ.* 220.

When the time for appearance is out, ſearch is to be made at the judges chambers for the plea-rule, and the plaintiff's attorney ſigning the conſent rule, takes it to the clerk of the rules, who files it, giving a copy thereof on ſtamp, for which is paid 6*s.* and when the iſſue is delivered, a copy of that rule is annexed on plain paper.

If the declaration be by bill, the iſſue is made up, with a memorandum of the term the plea is of, inſerting, the real defendant's name, inſtead of that of the caſual ejector. The memorandums of the iſſue will be the ſame as in other caſes, but ſaying, "of a plea of treſpaſs and ejectment."

If it is by original, the iſſue is made up the ſame term with the plea, but no memorandum.

The ſame time is allowed in ejectment for notice of trial, as in other caſes, both in town and country.

If the leſſor of the plaintiff is an infant, after the plea is filed, the defendant may have a ſummons, to ſhew cauſe, why further proceedings ſhould not be ſtaid, until a ſufficient guardian is appointed for

the leſſor of the plaintiff, who will undertake to pay the defendant ſuch coſts as may be adjudged to him, and an order will be granted, (although there is a real plaintiff named), and the petition is in the ſame manner to appoint a guardian as in other caſes.

Proceedings were ſtayed till the leſſor of the plaintiff ſhould give ſecurity for coſts, his reſidence being in Ireland, although the ejectment was brought under the direction of the court of chancery, and forty pounds ſecurity had been already given there. 4 *Burr.* 1177.

Upon affidavit of a declaration being tendered, and that the ſervants refuſed to call their maſter, or receive it, ſaying they had orders to take no papers, it was ordered, that leaving it at the houſe ſhould be ſufficient. *Stra.* 575.

The tenant ſecreting himſelf, the declaration was delivered to his daughter who kept the houſe, and ſhe was made acquainted with the contents. Rule, to ſhew cauſe, Why this ſhould not be good ſervice, the rule to be ſerved on the daughter at the houſe. *Barnes* 192.

The tenant was perſonated by another, who accepted the ſervice in his name. Rule, to ſhew cauſe Why it ſhould not be good ſervice, and why judgment ſhould not be ſigned againſt the caſual ejector and that leaving a copy of the rule at the houſe with ſome perſon there, or if no one to be met with, affixing it on the door, ſhould be good ſervice. *Burr.* 4 *pt.* 1181.

If judgment be ſigned by default againſt the caſual ejector, the landlord may move to ſet it aſide, if the tenant has not given him notice, and the court will make the tenant pay the coſts, for the poſſeſſion ought not to be changed, where there has been no trial, nor opportunity of trying. 4 *Burr.* 1997.

The record in ejectment is made up in the ſame manner as other caſes, the firſt *placita* is as exact as in other caſes, ſaying, inſtead of a plea of treſpaſs on the caſe, " of a plea of treſpaſs and ejectment," after trial if the plaintiff gets a verdict, a rule is given for judgment, and the coſts taxed as in other caſes.

If no defence is made to the ejectment, the plaintiff hath judgment in the following manner:

Judgment by nil dicit, *with a* remittitur damna.

And the said *William*, by *C. D.* his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *Richard*, but makes default, by which the said *Richard* remains therein undefended against the said *William*, for which the said *Richard* ought to recover against the said *William* his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *Richard*, freely, here in court, remits to the said *William*, all such damages, costs, and charges as he the said *Richard* hath sustained by occasion of the trespass and ejectment aforesaid, therefore the said *William* is free from those damages, costs and charges, and upon this the said *Richard* prays the writ of our lord the king to be directed to the sheriffs of the county aforesaid, to cause him to have the possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances, and it is granted to him, returnable on, &c.

Writ of possession.

George the Third, &c. To the sheriff of Berkshire, greeting: Whereas *Richard Red*, lately in our court before us at Westminster, by our writ, (if by bill by bill without our writ) and by the judgment of the same court, recovered against *William White* his term yet to come, of and in one messuage, &c. with the appurtenances, situate, lying and being in in your county, which *John Rogers* on the day of in the twenty-third year of our reign, demised to the said *Richard* for a term of years which is not expired, to hold from the day of then last past, until the full end and term of seven years, from thence next ensuing, and fully to be compleat and ended;

by

by virtue of which demiſe, the ſame *Richard* entered upon the ſame tenements with the appurtenances, and was poſſeſſed thereof, until the ſaid *William* afterwards, to wit, on the ſame day of in the twenty-third year aforeſaid, with force and arms, entered into the ſaid tenements with the appurtenances, and then and there ejected, drove out and removed him the ſaid *Richard* from his ſaid farm, his ſaid term then and there not being expired, and him the ſaid *Richard* hath withheld from his poſſeſſion thereof, and ſtill doth withhold, whereof the ſaid *William* is convicted, as appears to us of record: Therefore we command you, that, without delay, you cauſe the ſaid *Richard* to have his poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances, and in what manner you ſhould have executed this our writ make appear to us at Weſtminſter on and have you then there this writ. Witneſs, *William* earl Mansfield, at Weſtminſter the day of in the twenty-third year of our reign.

Stormont and *Way*

Writ of poſſeſſion, and fieri facias *for coſts.*

George, &c. "to the end of the writ of poſſeſſion as far as the return day, it then adds," we alſo command you, that of the goods and chattels of the ſaid defendant, in your bailiwick, you cauſe to be made and levied twenty-pounds which the ſaid *Richard* lately in our ſaid court before us at Weſtminſter, by our writ, (or "by bill without our writ"), and by the judgment of the ſame court, recovered againſt the ſaid defendant for his damages which he had ſuſtained, as well by reaſon of the treſpaſs and ejectment aforeſaid, as for his coſts and charges by him about his ſuit in that behalf expended, adjudged to the ſaid *Richard*, according to the form of the ſtatute in that caſe made and provided, whereof the ſaid defendant is convicted, as alſo apears to us of record, and have you the ſaid monies before us at Weſtminſter

on
to render to the ſaid *William* for his damages aforeſaid, and this writ. Witneſs, &c.

To be ingroſſed on a 2*s.* 6*d.* ſtamp, ſigning 1*s.* 8*d.* ſealing 7*d.*

Præcipe.

Middleſex, *Habere facias poſſeſſionem* for *Richard Red* againſt *William White*, on the demiſe of *John Rogers*, returnable on

A. B. attorney.

The writ of poſſeſſion has relation to its *teſte*, though it be not actually ſued out till after the death of the leſſor of the plaintiff; yet if teſted before his death it is regular. The legal relation to the day of the *teſte* is proper to be ſupported in maintenance of a writ of poſſeſſion on a judgment in ejectment. *Ibid.* 2 *Burr.* 1971.

The ſheriff grants a warrant on this writ, paying 2*s.* 4*d.* and he will put the leſſor of the plaintiff in poſſeſſion.

If the defendant, after entering into the common rule, wiſhes to withdraw his plea, and confeſs the action, in that caſe, a *retraxit*, or a *relicta verificatione* muſt be entered on the roll.

If the tenants, to ſave the expence of ſheriffs poundage and officers fee, attorn to the leſſor of the plaintiff; the attornment on unſtamped paper, is made thus:

Attornment.

In the king's bench. *Richard Red*, on the demiſe of *John Rogers*, plaintiff, and *George Green*, defendant.

"Be it remembered that we, whoſe names are here under-written, being the ſeveral tenants in poſſeſſion of the premiſſes mentioned in this cauſe, ſituate

tuate and being in the pariſh of, &c. do hereby ſeverally attorn, and become tenants to *John Rogers*, of, &c. eſquire, (the leſſor of the plaintiff, in the above cauſe); for ſuch parts of the ſaid premiſſes as are in our reſpective poſſeſſions; and we each and every of us, have this day ſeverally paid to the ſaid *John Rogers*, the ſum of one ſhilling upon ſuch attornment on account, and in part of the rent due, and to become due from us ſeverally and reſpectively, for and in reſpect of the ſaid premiſſes; and we do ſeverally and reſpectively become tenants thereof to the ſaid *John Rogers*, from the twenty fifth day of December laſt paſt. As witneſs our hands this day of 1784.

Writ of poſſeſſion on two ſeveral demiſes.

In the king's bench.

Richard Red on the demiſe of *John Rogers*, eſq. plaintiff, and

William White, defendant.

George the Third, &c. To the ſheriff of Berkſhire, greeting: Whereas *Richard Red*, lately in our court before us at Weſtminſter, by our writ (or by bill without our writ) and by the judgment of the ſame court, recovered againſt *George Green*, late of &c. his term yet to come of and in one meſſuage &c. with the appurtenances, in the pariſh of Sutton in your county, which *John Rogers*, on the day of in the twenty-third year of our reign, at the pariſh of Sutton aforeſaid, demiſed to the ſaid *Richard*, to have and to hold the tenement aforeſaid, with the appurtenances, to the ſaid *Richard* and his aſſigns, from the day of then laſt paſt, to the full end and term of ſeven years then next following, and fully to be complete and ended, by virtue of which demiſe, the ſaid *Richard* entered into the ſaid tenements, with the appurtenances, and was poſſeſſed thereof; and the ſaid *Richard*, being ſo poſſeſſed thereof, the ſaid *George* after war-

wards, that is to ſay, on the ſaid day of in the twenty-third year aforeſaid, with force and arms, that is to ſay, with ſwords, ſtaves and knives, at the pariſh of Sutton, aforeſaid, in your county, entered into the ſaid tenements with the appurtenances, which the ſaid *John Rogers* demiſed to the ſaid *Richard* in manner aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *Richard* out of his ſaid farm. And whereas the ſaid *Richard* lately recovered againſt the ſaid *George*, in our ſaid court before us at Weſtminſter, by the conſideration of the ſame court, his term yet to come of and in one other meſſuage, &c. with the appurtenances in the ſaid pariſh of Sutton, in your county, which *Samuel Smith*, on the day of in the ſaid twenty-third year of our reign, at the pariſh of Sutton aforeſaid, demiſed to the ſaid *Richard*, to have and to hold the ſaid laſt mentioned tenements, with the appurtenances, to the ſaid *Richard* and his aſſigns, from the day of then laſt paſt, to the full end and term of ſeven years, then next following, and fully to be complete and ended, by virtue of which laſt demiſe, the ſaid *Richard* entered into the ſaid laſt mentioned tenements with the appurtenances, and was poſſeſſed thereof, and the ſaid *Richard* being ſo poſſeſſed thereof, the ſaid *George*, afterwards, to wit, on the ſaid day of in the twenty-third year aforeſaid, with force and arms, that is to ſay, with ſwords, ſtaves and knives, at the ſaid pariſh of Sutton in your county, entered into the ſaid laſt mentioned tenements with the appurtenances, which the ſaid *Samuel Smith* demiſed to the ſaid *Richard* in manner aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *Richard* out of his ſaid farm; therefore we command you, that, without delay, you cauſe the ſaid *Richard* to have his poſſeſſion of his ſaid ſeveral terms yet to come, of and in the ſeveral tenements aforeſaid, with the appurtenances, and that you certify to us at Weſtminſter, in what manner you ſhall have executed this our writ. And have you there this writ. Witneſs, *William* earl Mansfield, &c. *Stormont* and *Way*.

Of recovering poſſeſſion by the landlord, having a right of re-entry according to the ſtatute of the 22 *Geo.* 2. *c.* 28.

This ſtatute, after reciting the frequent inconveniences to landlords or leſſors in caſes of re-entry for non-payment of rent at common law, by reaſon of the nicety of the proceedings, enacts, That in all caſes between landlords and tenants, as often as it ſhall happen that one half year's rent ſhall be in arrear, and the landlord or leſſor, to whom the ſame is due, hath a right by law to re-enter, for the non-payment thereof, ſuch landlord or leſſor ſhall and may, without any formal demand, or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſſes; or in caſe the ſame cannot be legally ſerved, or no tenant be in actual poſſeſſion of the premiſſes, then to affix the ſame upon the door of any demiſed meſſuage; or in caſe ſuch ejectment ſhall not be for the recovery of any meſſuage, then upon ſome notorious place of the lands, &c. comprized in ſuch declaration in ejectment, and ſuch affixing ſhall be deemed legal ſervice thereof, which ſhall ſtand in the name and place of a demand and re-entry; and in caſe of judgment againſt the caſual ejector, or nonſuit for not confeſſing leaſe, entry and ouſter, it ſhall be made appear to the court where the ſuit is depending, by affidavit, or be proved upon the trial, in caſe the defendant appears, that half a year's rent was due before the ſaid declaration was ſerved, and that no ſufficient diſtreſs was to be found on the demiſed premiſſes, countervailing the arrear then due, and that the leſſor or leſſors in ejectment had power to re-enter, then and in every ſuch caſe the leſſor or leſſors ſhall recover judgment, and have execution in the ſame manner, as if the rent in arrear had been legally demanded or a re-entry made, and in caſe the leſſee or leſſees, his, her or their aſſignee or aſſignees, or other perſon or perſons claiming or coming under the ſaid leaſes, ſhall permit and ſuffer judgment to be had and recovered on ſuch ejectment, and execution to be executed thereon

thereon, without paying the rent and arrears, and full costs, and without filing any bill for relief in equity, within six calendar months after execution executed, they shall be barred from all relief in law or equity, other than by writ of error; and the lessor shall hold the premisses discharged from the lease; and if upon such ejectment, a verdict shall pass for the defendant, or the plaintiff shall be nonsuited, except for not confessing lease, &c. the defendant or defendants shall have his, her, or their full costs.

Provided this act shall not extend to bar the right of any mortgagee or mortgagees, who shall not be in possession, so as such mortgagee, &c. within six calendar months, after judgment and execution, pay the rents in arrear, and all costs and damages sustained by the party, entituled to the reversion and remainder as aforesaid, and perform all the covenants and agreement of the first lessee or lessees, *s.* 2.

A lessee filing a bill in equity, shall not have an injunction, unless within forty days after answer, he brings into court so much money as the lessor shall in his answer swear to be due above all allowances and costs, and if the bill be filed within the time, and after execution executed, the lessor of the plaintiff shall only be accountable for what he shall really make of the premisses, from the time of his re-entry, and if that shall appear to be less than the rent reserved, the lessee shall before he is restored to the possession, pay the deficiency, *s.* 3.

But if the tenant shall at any time before the trial pay or tender to the lessor, &c. or pay into court, all rent, and arrears, and costs, all further proceedings shall cease, and if the lessee, &c. shall be relieved in equity, such lessee, &c. shall hold the premisses according to the former lease, without any new lease to be made thereof, *s.* 4.

The true construction upon this act is, to relieve the landlord from the inconvenience of his continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity, and to limit and con-

fine the tenant to ſix calendar months after execution granted for his doing this; or elſe that the landlord ſhall from thenceforth hold the demiſed premiſſes diſcharged from the leaſe. *Doe on Demiſe, Hitchings* v. *Lewis*, *Burr.* 4. *pt.* 614.

If the tenant is ſerved with a declaration in ejectment upon this act of parliament, he may apply by ſummons to ſtay proceedings upon payment of the rent and coſts to be taxed; indeed the court had permitted the tenant to bring into the court the rent in arrear and coſts, antecedent to the act. *Salk.* 597.

Affidavit of affixing the declaration.

In the king's bench.

Richard Red, on the demiſe of
John Rogers, plaintiff, and
William White, defendant.

John Rogers, the leſſor of the plaintiff in this cauſe, and *A. B.* of, &c. gentleman, ſeverally make oath and ſay, and firſt this deponent *A. B.* for himſelf ſaith, that on the day of laſt paſt, and for ſeveral days before, the meſſuage in the annexed declaration of ejectment mentioned, and late in the poſſeſſion of *George Green*, was ſhut up, and there being no tenant in the poſſeſſion thereof, he this deponent did, on the day of laſt, affix a copy of the ſaid declaration in ejectment hereto annexed, and the notice thereunder written, upon the ſtreet door or outward door of the ſaid meſſuage, late in the tenure of the ſaid *George Green*. And this deponent *John Rogers*, for himſelf ſaith, that before ſuch declaration in ejectment was affixed as aforeſaid, there was, and now is, due to him as landlord of the ſaid premiſſes, from the ſaid *George Green*, the tenant thereof, the ſum of twenty-five pounds for half a year's rent, upon and by virtue of a certain indenture of leaſe, made between this deponent of the one part, and the ſaid *George Green* of the other part, and that no ſufficient diſtreſs was then to be found upon the premiſſes, countervailing the arrears of rent then due to this deponent; and this deponent further ſaith, that he had at the time of the affixing of the ſaid declaration in ejectment upon

upon the door of the ſaid meſſuage, and now hath power to enter on the ſame, for the non-payment of the rent ſo in arrear as aforeſaid. Sworn, &c.

This affidavit is only neceſſary upon moving for judgment againſt the caſual ejector, or after a non-ſuit for the tenant's not confeſſing leaſe, entry, and ouſter; but if the ejectment comes to trial, all the matters in the affidavit muſt be proved on the trial. *Doe ex Demiſe, Hitchings* v. *Lewis. Burr.* 4 *pt.* 614.

The late tenant, or any other perſon claiming title, has the ſame time to appear in as tenants in poſſeſſion

The tenant moved to ſtay proceedings on payment of the rent, arrears, and coſt, on a rule to ſhew cauſe it was inſiſted, that the caſe was not within the act, for the ejectment was brought on a clauſe of re-entry for not repairing, and the leaſe was produced in court, but the rule was made abſolute, with liberty for the plaintiff to proceed on any other title. *Piere ex Demiſe, Withers* v. *Sturdy, H.* 1572.

Since this ſtatute, in ejectment on a condition of re-entry for non-payment of rent, proof of actual entry and ouſter is not neceſſary, nor of the demand of the rent. *Vide* 1 *Salk.* 259. 2 *Ld. Raym.* 756.

But the landlord is not in all caſes driven to his remedy by ejectment, for if any tenant holding at a rack rent, or where the rent reſerved ſhall be three-fourths of the yearly value, who ſhall be in arrear for one year's rent, ſhall deſert the premiſſes, and leave the ſame, ſo as no ſufficient diſtreſs can be had, two juſtices of the peace, having no intereſt in the premiſſes, at the requeſt of the landlord, may go and view the ſame, and affix on the moſt notorious part of the premiſſes, notice in writing what day, at the diſtance of fourteen days at leaſt, they will return to take a ſecond view thereof; and if on ſuch ſecond view, the tenant, or ſome perſon on his behalf, ſhall not pay the rent in arrear, and there ſhall be no ſufficient diſtreſs, the juſtices may put the landlord into poſſeſſion, and the leaſe thereof to ſuch tenant, as to any demiſe, ſhall be void. 11 *Geo.* 2. *c.* 19.

Of

Of ejectment by a mortgagee, having a right of entry.

If a mortgagee, having a right of entry, brings an ejectment, and the premiſſes are untenanted, the mortgagee muſt ſeal a leaſe to the plaintiff in ejectment, who muſt be ejected by the nominal defendant, to whom the declaration muſt be then delivered, to which there is no neceſſity to add the uſual notice, and it muſt be delivered by ſome other perſon.

Inſtead of a notice, a rule to plead muſt be given; the parties muſt be all real perſons, and when the rule is out, judgment may be ſigned, without a motion for that purpoſe as in other caſes.

If the mortgagee means only to get into receipt of the rents, &c. he need not give the tenant notice to quit before bringing the ejectment, although the mortgage be ſubſequent to the leaſe. But in ſuch caſe he ſhall not be ſuffered to turn the tenant out of poſſeſſion. *White ex Demiſe, Whatley* v. *Hawkins, Bull, Ni. Pri.* 96.

When any action ſhall be brought on any bond for payment of money ſecured by mortgage or performance of the covenants therein, or when any ejectment ſhall be brought in any of the courts at Weſtminſter, great ſeſſions, or ſuperior courts of the counties palatine, by any mortgagee, &c. for the recovery of the poſſeſſion of any mortgaged lands, &c. and no ſuit ſhall be then depending in equity touching the foreclоſing or redeeming of the premiſſes, if the perſon having a right to redeem, and who ſhall appear and become defendant ſhall at any time pending ſuch action, pay unto ſuch mortgagee, &c. or on refuſal bring into the court where ſuch action ſhall be depending, all the principal and intereſt due, and all ſuch coſts as have been expended in any ſuit at law, or in equity, upon ſuch mortgage (to be aſcertained and computed by the proper officer of the court) the monies ſo paid or brought into court ſhall be deemed to be in full ſatisfaction of ſuch mortgage and the court ſhall diſcharge the mortgagor of and from the the ſame accordingly; and by rule of the

ſame

ſame court compel the mortgagee to aſſign, ſurrender, or reconvey the mortgaged premiſſes, and ſuch intereſt therein, as the mortgagee hath; and to deliver up all deeds, &c. in his cuſtody relating to the title thereof to the mortgagor, who ſhall have brought ſuch monies into court, his executors, &c. or ſuch other perſon as he ſhall appoint.

On bills of foreclosure brought in equity for payment of money, or in default, recovery of the premiſſes, ſuch court, upon application of the defendant, having a right to redeem; and upon admiſſion of the plaintiff's right, may before hearing make order therein. 7 *Geo.* 2. *c.* 20.

But it is provided that the above act ſhall not extend to caſes where the right of redemtion is controverted, or the money due not adjuſted; or to prejudice any ſubſequent mortgage.

Rule *niſi* to make a judge's order to ſtay proceeding in ejectment on bringing in principal, intereſt and coſts, a rule of court. But it appearing, that notice had been given by the mortgagee to the mortgagor, that he inſiſted upon the payment of two bonds which were liens upon the eſtate, the rule *niſi* was diſcharged. *Barnes* 177.

When there are two or more mortgages the court will not ſtay proceedings, and compel a redemtion on payment of one only. *Roe ex Dem. Kaye* v. *Soley, Aſſignee, Mich.* 14 *Geo.* 3. *C. B.* 2 *Blackſt. Rep.* 726.

If the defendant doth not appear at the trial, and confeſs leaſe, entry, and ouſter, according to the rule, the practice is to call the defendant and his attorney, if he be within the rule, and on his non-appearance, or refuſal to comply with the rule, to call the plaintiff and nonſuit him; then, at the plaintiff's inſtance, the cauſe of the nonſuit is indorſed on the *poſtea*, which intitles the plaintiff to judgment againſt the caſual ejector, when the *poſtea* is returned into court. And the maſter will tax coſts upon the rule, for confeſſing leaſe, entry, and ouſter, and if they be demanded of the defendant, and not paid, the court upon affidavit will grant an attachment. *Salk.* 259.

If

If there are ſeveral defendants for the ſame premiſſes, and ſome appear and confeſs, but others do not, the practice is to proceed againſt thoſe who do appear, and to enter a verdict for the reſt; but then the cauſe of that verdict is indorſed on the *poſtea*, which, as to them, intitles the plaintiff to judgment againſt the caſual ejector. *Lord Raym.* 729.

If the plaintiff is nonſuited, for want of confeſſing leaſe, entry, and ouſter, judgment is ſigned againſt the caſual ejector, as if no appearance was entered, upon a double half crown ſtamp paper, the rule for appearance is drawn up at the clerk of the rules, paying 5*s.* on the return day of the *diſtringas*, the record and conſent-rule with the judgment paper, are taken to the maſter, and who will tax the coſts on the conſent rule, a copy of which is to be ſerved on the defendant, and the coſts demanded, which if not paid to the leſſor of the plaintiff, he may, on affidavit thereof, move for an attachment; but the writ of poſſeſſion cannot be taken out by the leſſor of the plaintiff, upon the judgment againſt the caſual ejector, until the return-day of the *diſtringas*.

If a verdict is given for the defendant, or the plaintiff is nonſuited for any other cauſe, then not confeſſing leaſe, entry, and ouſter, the defendant muſt proceed to tax his coſts on the *poſtea*, as in other actions, and ſue out a *capias ad ſatisfaciendum* againſt the plaintiff; and if upon ſhewing the writ under ſeal, to the leſſor of the plaintiff, and ſerving him with a copy of the rule by conſent, to confeſs leaſe, entry, ouſter, and the leſſor of the plaintiff does not pay them, the court will grant an attachment againſt him.

If the plaintiff is nonſuited, he may pay the coſts to which of the defendants he pleaſes. *Str.* 516.

The plaintiff in ejectment is a mere nominal perſon, and truſtee for the leſſor, and cannot therefore releaſe the action without being guilty of a contempt; or if he releaſes an action for the *meſne* profits brought in his name he may be committed for a contempt.

S

So the uſual ejector hath no intereſt in the premiſſes, and cannot confeſs judgment. *Stra.* 531.

The caſual ejector cannot bring error. *Barnes* 189.

Nonſuit on the defendant's not appearing at the trial to confeſs leaſe, &c. the leſſor of the plaintiff, inſtead of taking his remedy for coſts taxed on the common rule, entered judgment againſt the caſual ejector; ſued out a *fieri facias* againſt the defendant's goods, and levied his coſts thereon, acting himſelf as ſpecial bailiff. An action being brought in *B. R.* the defendant moved in *C. B.* to ſet aſide the *fieri facias*; and the court ordered reſtitution, and the defendant's coſts to be paid by the leſſor, and, by conſent, the action in *B. R.* to be diſcontinued without coſts, and no other action brought. *Barnes* 182.

Though the defendant confeſs leaſe, entry, and ouſter, he may deny that he is in poſſeſſion of the premiſſes the plaintiff goes for; and if the plaintiff cannot prove it, he will be non-ſuited. *Smith* v. *Mann*, *Tr.* 21 *Geo.* 2.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other caſes. 4 *Burr.* 2224.

A verdict cures a defect in ſetting out the title, 1 *Burr.* 1162. the pleadings were intitled Hilary, 1 *K. Geo.* 3. the leaſe ſaid to be made "thirty-third of ſaid king, to hold from the quarter day then laſt paſt," verdict confirmed as being a mere miſtake of the clerk. *Ibid.*

Execution muſt be taken out according to what in right and juſtice is really recovered, and cannot be taken out for more; for the judgment is not to be for a moiety only, it muſt be that he recover his term. 1 *Burr.* 366.

If the term expires, pending the ſuit, the plaintiff cannot recover the poſſeſſion, becauſe the court cannot give the plaintiff judgment for the land, when it appears, upon the face of the record, that his title is determined, yet he ſhall have judgment for his damages for the treſpaſs ſtill remaines. *Sav.* 28, *Co.* 4. 285.

If the defendant be acquitted of part, and judgment be entered *quod def. ſit quietus quoad*, this is error, for the judgment is not final, as in writs of right, and doth not protect the defendant from any further ſuit, but only quits againſt the title ſet up by the plaintiff in that action; but ſince it appears that the demand was groundleſs, as to part, the judgment as to that part muſt be *quod def. eat inde ſine die*, the plaintiff as to that having no further cauſe to detain him in court. *Cro. Eliz.* 763.

If one of the defendants die after verdict, the plaintiff ſhall have judgment againſt the ſurvivors, on his ſuggeſting the death on the roll; but the judgment as to the deceaſed muſt be *quod quer. nil capiat.* Moor 469. Cro. Car. 513. 12 Jon. 401.

Verdict in ejectment againſt baron and feme, and the baron dies before judgment, the plaintiff may, on the ſuggeſtion, have judgment againſt the wife, not only becauſe it is a treſpaſs committed by the wife; and that therefore ſhe is puniſhable for her own act, which is injurious to another; but becauſe when the wife is found guilty of the ejectment, ſhe muſt have obtained the unlawful poſſeſſion, either jointly with the huſband, and it then ſurvives, or elſe ſhe had the whole poſſeſſion in her own right and in either caſe the plaintiff may puniſh her, and recover the poſſeſſion, which is wholly in her, on the death of her huſband. *Roll. Rep.* 14. *Cro. Jac.* 35[illegible]

Formerly, if the demiſe was laid for a longer term than the plaintiff had in the premiſſes, the plaintiff could not recover. *Per Hale, Trin. 27 Car.* But lord Mansfield ſaid, that there is nothing in the objection; for if the leſſor have title, though but for a week, he ought to recover; for the true queſtion in ejectment is, Who has the poſſeſſory right? Suppoſe a perſon who has an intereſt for three years only ſhould make a leaſe for five, it would be good for the three. *Bull, Ni. Pri.* 106.

Judgment to recover his term when there were two demiſes of different lands, and error brought and objected, that judgment being in the ſingular to recover his term was wrong. *Per Cur.* the judg[illegible]

ment is to recover his term *de & in tenementis prædict*, which *reddendo ſingula ſingulis*, is well enough, for there is but one term in each of the premiſſes. *Stra.* 835.

Motion in arreſt of judgment, the words in the declaration being one meſſuage or tenement, which is too uncertain, *tenement* being all a man holds, and after judgment the ſheriff cannot tell of what to deliver poſſeſſion. Rule to ſtay judgment until cauſe ſhewn, and afterwards judgment arreſted. *Barnes* 174.

Ejectment for one meſſuage with the appurtenances, in the pariſh of A. or B. or one of them: and though after a verdict for the plaintiff, judgment was arreſted. *Barnes* 184.

Motion in arreſt of judgment after verdict that the demiſe was laid on a day not then arrived, held no objection. *Burr.* 4 *pt.* 1154.

The death of the plaintiff in ejectment is no grounds to arreſt the verdict. 1 *Mod.* 252.

Motion in arreſt of judgment on a fault in the original, but the maſter certifying that there was no original, the plaintiff had judgment, although the declaration recited an original. 1 *Mod.* 3.

There is no diſtinction between a judgment in ejectment on verdict and one by default, in the former the right is found, in the latter confeſſed. *Burr.* 4 *pt.* 667.

If there be a verdict for the plaintiff, he may have a *capias ad ſatisfaciendum*, or *fieri facias*, for the coſts, and a writ of *habere facias poſſeſſionem* afterwards, or writ of poſſeſſion, and *fieri facias* together in one writ. [For final judgment after verdict, *vide* page 190.]

Judgment after the defendant has withdrawn his plea and coſts taxed, and alſo for the poſſeſſion.

At which day before our lord the king at Weſtminſter, came the parties aforeſaid, by their attornies aforeſaid, and the ſheriff did not ſend the ſaid writ, nor did he do any thing thereupon; and hereupon the ſaid *George Green* by his ſaid attorney, comes and

relinquiſhes his averment, by him in pleading above pretended, and ſays, that he cannot deny the ſaid action of the ſaid *Richard*, nor but that he is guilty of the treſpaſs and ejectment aforeſaid, in manner and form as the ſaid *Richard* hath above thereof complained againſt him; and the ſaid *Richard Red* further ſaith, and acknowledges, that he hath ſuſtained damages by reaſon of the treſpaſs and ejectment, aforeſaid beſides his coſts and charges by him laid out about his ſuit in this behalf to 1*s.* and no more; and becauſe the ſaid *George Green* doth not deny the ſame, but admits the allegation to be true, the ſaid *Richard* prays judgment, and his damages ſo acknowledged in form aforeſaid, together with his coſts and charges aforeſaid, may be adjudged to him, &c. Therefore it is conſidered that the ſaid *Richard*, recover againſt the ſaid *George* his term aforeſaid, yet to come of and in the tenements aforeſaid, with the appurtenances, and the ſaid 1*s.* damages in form aforeſaid, acknowledged, and alſo 7*l.* 10*s.* for his coſts and charges by him laid out and expended about his ſuit in this behalf, adjudged to the ſaid *Richard* by his conſent, by the court of our lord the king now here, which ſaid damages, coſts, and charges, amount in the whole to 7*l.* 11*s.* And the ſaid *Richard* prayeth the writ of our ſaid lord the king, to cauſe him to have his poſſeſſion of the term aforeſaid, yet to come of and in the tenements aforeſaid, with the appurtenances, and it is granted to him, returnable, &c.

If judgment is obtained in ejectment, an action for the *meſne* profits may be brought either in the name of the nominal plaintiff, or in the name of the leſſor of the plaintiff, and in either ſhape it is equally his action againſt the tenant in poſſeſſion to recover the value of the profits, unjuſtly receiv[ed] by the tenant, in conſequence of the ouſter complained of in the ejectment; for after a recovery in ejectment, the tenant is eſtopped from controverting the plaintiff's title, in a ſubſequent action for the *meſne* profits, provided the plaintiff only proceed ſo

for *meſne* profits from the time of the ouſter complained of in the ejectment; but if he proceed, for antecedent profits, he muſt prove his title to the premiſſes from whence they aroſe, to ſhew his right to receive them. 2 *Burr.* 668.

In order to prove the plaintiff's title, it is only neceſſary to produce the copy of the judgment in ejectment, where the judgment is after verdict, together with the attorney's bill; but if by default, then a writ of poſſeſſion executed is neceſſary. But it is ſaid the latter does not ſeem requiſite, for if the tenant be concluded by the judgment in ejectment, from controverting the plaintiff's title, he is conſequently concluded from controverting his poſſeſſion, becauſe his poſſeſſion is part of his title. As to the value of the *meſne* profits, that muſt be proved; but in eſtimating that value, the jury are not confined to the mere rent of the premiſſes, for they may give whatever damages they think proper, though the defendant may plead the ſtatute of limitations, and by that means protect himſelf from all but the laſt ſix years. 3 *Wilſ.* 121. 2 *Burr.* 267. *Bull, Ni. Pri.* 88.

And in caſe an action is brought by the nominal plaintiff, the court, on application, will ſtay the proceedings thereon, till ſecurity is given for coſts.

If one tenant in common recovers in ejectment againſt another, he may have an action for the *meſne* profits. 3 *Wilſ.* 118.

The defendant cannot pay money into court in an action for *meſne* profits. 2 *Wilſ.* 115.

The plaintiff having judgment to recover his term, may enter without an *habere facias poſſeſſionem*, for where the land recovered is certain, the recoverer may enter at his own peril, and the aſſiſtance of the ſheriff is only to preſerve the peace. 1 *Sid.* 156. 1 *Rol. Rep.* 213. *Noy* 71. *Palm.* 263.

The plaintiff may enter pending a writ of error upon judgment in ejectment, if he finds the poſſeſſion empty, for the writ of error binds only the court, but then he muſt take care he doth not enter with force. *Badger* v. *Lloyd, Holt* 199. *Ld. Raym.* 808.

If the plaintiff neglect to ſue out an *habere facia poſſeſſionem* within the year, he muſt bring a *ſcire facias* to revive the judgment.

Judgment for two meſſuages, and a *ſcire facias* recited a judgment of one meſſuage only, to which *nul tiel record* being pleaded, it was moved to amend it; but denied. For there may be ſuch a judgment, and this does not appear to be erroneous upon the face of it. 6 *Mod.* 310.

If the defendant after judgment given, brings error after the year, and afterwards becomes nonſuit, the plaintiff in error may ſue out execution without a *ſcire facias*. Cro. Eliz. 416. 5 Co. 88. Lord Raym. 807.

No new ejectment ſhall be brought by the defendant until he has quitted poſſeſſion, or the tenants have attorned to the plaintiff ſo as he be in poſſeſſion and the the defendant out. *Salk.* 258.

Though the writ of poſſeſſion be not actually ſued out till after the death of the leſſor of the plaintiff, yet if teſted before his death is regular. *Burr. Rep.* 4 *pt.* 1971.

If the recovery be of a houſe, the ſheriff may break open the door if denied entrance; becauſe the writ cannot be otherwiſe executed. 5 *Co.* 916.

The ſheriff is to give poſſeſſion on the plaintiff's ſhewing, who is, at his peril, to take poſſeſſion of no more than he is entitled unto. *Burr. Rep.* 4 *pt.* 2673.

If the recovery be of twenty acres, the ſheriff muſt give twenty, according to the common eſtimation of the county where the lands are. *Roll. Rep.* 410.

The writ is not executed until the ſheriff and his officers are gone, and the plaintiff left in quiet poſſeſſion. If the officer is diſturbed in the execution of the writ the court will, on affidavit thereof, grant an attachment againſt the party, whether the defendant or a ſtranger; for the writ is the proceſs of the court and the diſturbance is a contempt of its authority. 6 *Mod.* 27.

But after poſſeſſion once given, if the plaintiff be turned out by the defendant, and the writ not re-

turned

turned, he may have a new *habere facias*, or an attachment; but if by a ſtranger, after execution executed, the plaintiff is put to his new action upon an indictment of forcible entry where the force will be puniſhed; for the title was never tried between him and the ſtranger, who may claim by title paramount to the plaintiff; or may come in under him; for the former execution ought to not hinder the ſtranger from that poſſeſſion he may have a right to; or the plaintiff might turn out his own tenant who came in after execution executed; whereas the poſſeſſion was given him againſt the defendant only, and not againſt others, not parties to the ſuit. *Radcliffe* v. *Tate*, *Keb.* 479. 1 *Salk.* 321.

On motion for an attachment for ejecting the plaintiff, who had been put into poſſeſſion by an *habere facias*, the court made no rule; for it appeared that the ejector claimed under an elder judgment; and it was title againſt title, and therefore left them to take their courſe at law. *Style.* 318.

All the courts conſider a former ejectment in another court, as one in the ſame court, and will ſtay proceedings in a ſecond, until the coſts of a former are paid. *Barnes* 133. 2 *Blackſt. Rep.* 1158.

The court would not ſtay proceedings in one ejectment until the event of another was determined. *Burr. K. B.* 47. But proceedings in a ſecond ejectment were ſtayed till a ſpecial verdict in the former was determined. *And.* 298. 2 *Stra.* 1105.

In treſpaſs againſt the tenant in poſſeſſion, for *meſne* profits, after a recovery in ejectment, either by the leſſor or the nominal plaintiff, it is not neceſſary to prove a title, but it is ſufficient to produce the judgment and the writ of poſſeſſion executed, and to prove the value of the profits, and thereupon the plaintiff ſhall recover from the time of the demiſe laid in the declaration. *Burr. Rep.* 4 *pl.* 668. *Barnes* 472.

Chap. XLI.

Of abatement, nonpros, *diſcontinuance, conſolidating actions, and ſuggeſtion.*

IN actions merely perſonal, ariſing *ex delicto*, for wrongs actually done by the defendant, the rule is *actio perſonalis moritur cum perſona.* 4 Inſt. 315. and it ſhall never be revived, either by or againſt the repreſentatives; but in actions ariſing *ex contractu*, by breach of promiſe, and the like, where the right deſcends to the repreſentatives of the plaintiff, and thoſe of the defendant have aſſets to anſwer the demand, though the ſuits ſhall abate by the death of the parties yet they may be revived by or againſt the executors. *March.* 14.

The death of either party between verdict and judgment, ſhall not be alledged for error, ſo as judgment be entered within two terms after ſuch verdict. 17 *Car.* 2. *c.* 18.

If any plaintiff happen to die after an interlocutory judgment, and before final judgment obtained, the ſaid action ſhall not abate therein, if ſuch action might be originally proſecuted, or maintained by the executors or adminiſtrators of ſuch defendant, and a *ſcire facias* may be had thereon.

If there be two or more plaintiffs or defendants, and one or more of them ſhould die, if the the cauſe of ſuch action ſhould ſurvive to the ſurviving plaintiff or plaintiffs, or againſt the ſurviving defendant or defendants, the writ or action ſhall not thereby be abated; but ſuch death being ſuggeſted upon the record, the action ſhall proceed againſt ſuch defendant or defendants ſurviving. 8 & 9 *W.* 3. *c.* 11.

The general rule is, that where the death of any party happens, and yet the plea is in the ſame condition as if ſuch party were living, there ſuch death makes no alteration or abatement of the writ. 10 *Mod.* 251. *Gil. C. P.* 242.

If either party die before the aſſize, it is out of the ſtatute; but if during the aſſizes, though before trial, it is no error; for the aſſizes is but one day in law. *Salk.* 8. *pl.* 21. 9. *Ld. Raym.* 1415.

If after verdict, and before the day in bank, the plaintiff dies, and the defendant ſigns judgment the ſecond term after the verdict, that is within the ſtatute, and the ſame as if he had entered judgment on the roll. *Sid.* 385. 1 *Wilſ.* 302.

An ejectment againſt baron and feme, after verdict for the plaintiff, baron dies between the day of *niſi prius*, and the day in bank; adjudged that the writ ſhould ſtand good againſt the *feme*, becauſe it is in the nature of a treſpaſs, and the *feme* is charged for her own act; and the action ſurvives againſt her, ſo if the wife had died, the baron ſhould have judgment entered againſt him. *Cro. Jac.* 356. *Cro. Car.* 599. *Roll. Rep.* 14. *Moor* 469.

If a *feme* ſole, plaintiff, after verdict, and before the day in bank, takes huſband, ſhe ſhall have judgment, *Cro. Car.* 232. but a *ſcire facias* muſt be ſued out before execution.

If pending an argument on a ſpecial verdict, and the court takes time to conſider thereon, the plaintiff dies; the judgment will be ordered to be entered up as of the term in which judgment ought to have been ſigned. 1 *Burr.* 226. the like may be done if the defendant dies. *Ibid.* 147. 4 *Burr.* 2277.

A *feme* ſole cannot abate her own writ by marriage, for this would be taking advantage of her own act. 2 *Roll. Rep.* 52.

If a *feme* ſole is ſued, and after ſhe takes a huſband, it is no abatement of the writ. *Ld. Raym.* 1525. 1 *Stra.* 811.

Debt againſt a *feme* ſole, in the palace court, and pending the ſuit ſhe intermarried, and afterwards removed the cauſe by *habeas corpus* and the plaintiff declared againſt her as a *feme* ſole, ſhe pleaded coverture at the time of the *habeas corpus* ſued out, and it was ruled a good plea, for the proceedings here are *de novo*, and the court takes no notice of the proceedings below; but the court ſaid if this matter had been

moved, upon the return of the *habeas corpus*, they would have granted a *procedendo*, for though a *habeas corpus* be a writ of right, yet where it is to abate a rightful ſuit, the court may refuſe it. 1 *Salk.* 8.

Defendant whilſt ſole was arreſted in the palace court, and a day or two after married, and then removed the plaint by *habeas corpus* into *C. B.* and pleaded her coverture in abatement; rule to ſhew cauſe why the plea ſhould not be ſet aſide, was on hearing counſel made abſolute. *Barnes* 355.

The law abhors multiplicity of actions; and therefore whenever it appears upon record, that the plaintiff has ſued out two writs againſt the defendant for the ſame thing, the ſecond writ ſhall abate; for if it were allowed that a man ſhould be twice arreſted, or twice attached by his goods for the ſame thing, by the ſame reaſon he might ſuffer *ad infinitum*; but then it muſt plainly appear to be for the ſame thing. *Mod.* 418, 539. 5 *Co.* 61.

Of nonpros.

If the plaintiff neglects to deliver his declaration in due time, or is guilty of any neglect or default againſt the rules of the law in any ſubſequent ſtages of the action, he is adjudged not to follow or purſue his remedy as he ought to do; and for thus deſerting his complaint, he ſhall not only pay coſts to the defendant, but is liable to be amerced to the king, *pro falſo clamore ſuo.* But if the matter ſhould be under accommodation, or any thing ſhould prevent the plaintiff's declaring within two terms, he may get a ſide-bar rule from the clerk of the rules for further time to declare (if defendant be not in cuſtody), *Rule* 3. and muſt ſerve defendant's attorney with a copy thereof.

Signing nonpros.

The judgment of *nonpros* muſt be ingroſſed on roll, on which is entered the warrant of attorney for the defendant only; and alſo on a double half-crown ſtam

ſtamp paper, which is taken to the clerk of the judgments, ſigning judgment, 3ſ.

Nonpros *for not declaring upon a bill of Middleſex.*

As yet of the term of in the twenty-third year of the reign of king George the Third. Witneſs, *William* earl Mansfield.

Middleſex, to wit. *Benjamin Black* puts in his place *C. D.* his attorney, at the ſuit of *William White* in a plea of treſpaſs,

Middleſex, to wit. *Benjamin Black*, according to the form of the ſtatute in ſuch caſe made and provided, was ſerved with a precept of our lord the king, called a bill of Middleſex, iſſued out of the court of our ſaid lord the king, before the king himſelf, directed to the ſheriff of Middleſex, returnable on next, after now laſt paſt, to anſwer *William White* in a plea of treſpaſs, and the ſaid *Benjamin* at that day appeared, by *C. D.* his attorney, according to the form of the ſtatute in ſuch caſe made and provided; and the ſaid *William*, in the aforeſaid court of our ſaid lord the king, before the king himſelf at Weſtminſter aforeſaid, hath not declared by his bill, or declaration in any perſonal action, or in ejectment, againſt him the ſaid *Benjamin*, before the end of term then next following, being the next term after the appearance of him the ſaid *Benjamin*: therefore it is conſidered by his majeſty's court here, that the ſaid *William* take nothing by his ſaid precept, but that he be in mercy, &c. And it is further conſidered by the court here, that the aforeſaid *Benjamin* recover againſt the ſaid *William* thirty-three ſhillings and ſix-pence for his coſts and charges laid out by him, about his defence in this particular, by the court of our ſaid lord the king here, adjudged to the ſaid *Benjamin* and by his aſſent, according to the form of the ſtatute in ſuch caſe made and provided; and that the aforeſaid *Benjamin* have his execution thereof, &c.

If the defendant was ſerved with a "*latitat*," it is ſo termed, and called "writ" inſtead of precept.

If he was arreſted, "the *ac ætiam*" is inſerted.

The coſts are taxed at 33*s.* 6*d.* on ſervice of courſe, and if there is bail, coſts of proceſs are taxed by the maſter. And an action can be maintained in this court on the judgment of *nonpros*, though it is only 33*s* 6*d.* 1 Wilſ. 316. Cro. Eliz. 96.

The plaintiff may alſo be *nonproſſed* in any ſtage of the ſuit, for not complying with the rules of the court, *viz.* not replying to defendant's plea, nor ſurrejoining to his rejoinder, not entering the iſſue when ſerved with a rule within the time allowed for that purpoſe.

Judgment of *nonpros* is a final judgment, and though the plaintiff may hold defendant to bail a ſecond time, yet the court will not ſuffer him to bring the ſecond action, until he has paid the coſts of the firſt, or if he does they will make him ſtay the proceedings till they are paid, and the coſts of the application.

And the defendant may on a *nonpros*, tax coſts, and ſue out execution, or bring an action againſt the plaintiff, on the judgment. After a *nonſuit* or *nonpros*, the plaintiff may commence a freſh action for the ſame cauſe, but not after a *retraxit*. for a *retraxit* is a total relinquiſhment of the ſuit, and a compleat diſcharge of the action, and is conſidered as a departure in ſpite of the court, and uſed to ſhew that the plaintiff ceaſes to proſecute his ſuit for ever, and may be pleaded in bar to another action. 1 *Wilſ.* 90.

If the defendants ſever in their plea, the plaintiff may at any time, before the record is ſet down for trial, enter a *nonpros* againſt one or more of them. *Salk.* 457.

The defendant did not file common bail within two terms, and plaintiff did not declare after the end of the ſecond term; but before the third term, defendant filed bail, and entered a *nonpros*. On motion to ſet it aſide, the maſter was of opinion, that a *nonpros* could never be ſigned, unleſs bail was filed within two terms. *Holms* v. *White*, *E.* 11 *Geo.* 3.

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The defendant, if he files common bail in time, *i. e.* within the two terms, has twelve months after to sign his *nonpros*, but not afterwards. *Holmes* v. *White*, *East*. 11 *Geo*. 3.

If the writ is joint, and the appearance several, the plaintiff cannot sign several *nonpros's*, as there ought to be but one. *Comyns* 744. *Burr*. 2418. *Salk*. 455.

If the defendant removes the cause by *habeas corpus*, he cannot nonsuit the plaintiff for not declaring, as the plaintiff is not bound to follow him, *R. Mich*. 16 *Car*. 2. But he must declare in two terms after the return of the writ. *Ibid*.

If a prisoner is superseded on filing common bail, he never can he sign a *nonpros*. Sed. Q.

A *nonpros* may be set aside for irregularity on motion, but it must be on affidavit of the facts.

Executors and administrators must pay costs for not declaring in due time, so they pay cost for not going to trial pursuant to notice, unless under special circumstances. 4 *Burr*. 1584. but on a *nonsuit* they pay no costs. *Ibid*.

A *latitat* was against five, and one signed *nonpros*, held sufficient for all. 12 *Mod*. 217.

Latitat against four, the plaintiff nonsuited by each, severally for not declaring, and 30*s*. costs awarded to each, but it was held ill. For *per* Holt, C. J. Though the plaintiff might declare severally, yet as the writ was awarded jointly, and the *nonsuit* was before declaration, there ought to be but one *nonsuit* for all. *Com*. 74.

In trespass against several, the plaintiff may enter a *nonsuit* as to one or more, and go on against the rest.

The plaintiff's attorney was summoned before a judge to produce his client, and an order made, that unless he produced him within a month, the defendant should by consent have liberty to sign *nonpros*. He did not produce him, and *nonpros* was signed, and on affidavit that no such man could be found, the court on motion made a rule for the attorney to pay the costs, and upon affidavit of the non-

non-payment on demand, granted an attachment againſt the attorney. *Glynn* v. *Kirby*, *Stra.* 402.

An attorney cannot enter a *retraxit*, it muſt be done in *propria perſona*. Coax v. Lowther. Lord Raym. 598.

But an attorney may enter a *remiſit damna*. Lord Raym. 1142.

Two joint obligors, one was ſued, and a *retraxit* entered as to him, the other being afterwards ſued, pleaded the *retraxit*, and the better opinion was that it was a good bar.

In *aſſumpſit* againſt two partners, one pleads a judgment recovered againſt both, the other pleads bankruptcy, plaintiff replies *nul tiel record*, and upon iſſue, judgment was given againſt him, and a writ of inquiry of damages awarded, and final judgment upon the bankruptcy, iſſue is alſo joined, whereupon the plaintiff entered a *noli proſequi*, that he would not further proceed as to the iſſue joined between him and the bankrupt; and upon error being brought, it was held well, and judgment was affirmed, and Denniſon J. ſaid, that the plea of bankruptcy is not a plea to the action, but only a perſonal diſcharge; but that if one defendant was to plead a plea that was to go to the action, he thought it might then have a different conſideration, for the ſtat. 10 *Ann. c.* 15. hath made the parties, not the bankrupt, liable for the whole debt.

Of diſcontinuance.

If the plaintiff finds he cannot ſupport the action, or hath any other reaſon for ſo doing, he may diſcontinue, either before or after declaration, by motion at the ſide bar, on payment of coſts. *Rule*, *Mich.* 10 *Geo.* 2.

Diſcontinuance is a very ancient word in law, and hath divers ſignifications, as a diſcontinuance of proceſs where it ought to be continued, ſo likewiſe of pleadings, &c. or diſcontinuance of the ſuit, where it is brought wrong, or the plaintiff does not think

think proper further to proſecute his ſuit. *Co. Litt.* 325. *a.*

The rule for diſcontinuance is made out by the clerk of the rules, paying 4*s.* an appointment muſt be got thereon to tax the coſts by the maſter, and a copy ſerved on the defendant's attorney, if he does not attend, on the third appointment, the maſter taxes the coſts *ex parte*, which muſt be paid forthwith, as the rule is conditional, and has no effect until payment made; but in replevin the avowant cannot have a rule to diſcontinue, for though he is an actor in law, yet it is the plaintiff's ſuit. *Stra.* 112.

The plaintiff cannot diſcontinue his action after demurrer joined and entered; or after a verdict on enquiry, without leave of the court, *Cro. Ja.* 35. 1 *Lil. Abr.* 473. It has been ruled that plaintiff may diſcontinue upon motion after a ſpecial verdict, which is not complete and final, but never after a general verdict. 1 *Salk.* 178. 1 *Nelſ.* 663.

The plaintiff moved to diſcontinue after judgment on demurrer for him, but not entered on record, or payment of coſts, and a writ of error brought; but the court refuſed it, without paying the coſts on the writ of error. *Barnes* 169.

The plaintiff, after a verdict on iſſue joined, or a writ of enquiry, cannot diſcontinue without the aſſent of the defendant. *Per Holt, Carth.* 87.

Plaintiff cannot diſcontinue after ſpecial verdict, in order to adduce freſh proof in contradiction to the verdict.

Action againſt defendant by a wrong name, plea in abatement, plaintiff declared *de novo* by the right name. Defendant pleaded *auter action pendent*. On which the plaintiff moved to diſcontinue the former action. *Per* Holt, It is too late. *Ld. Raym.* 1014.

After notice of trial, and regular countermand, the plaintiff obtained a rule to diſcontinue, on payment of coſts. After the notice, and before the countermand, witneſs ſet out for York. *Q.* Whether the expence could be allowed in coſts. Held, that as the countermand was regular, the coſts of the witneſs could not be allowed. *Barnes* 307.

Of

Of conſolidating of actions.

If there be two or more actions brought upon the ſame policy of aſſurance againſt the underwriters, or two or more ejectments on the demiſe of the ſame leſſor of the plaintiff for the ſame premiſſes, the defendants may apply to the court by way of motion to conſolidate ſuch actions; if in term time, it is a rule to ſhew cauſe, (which is in ejectment made abſolute of courſe) if in vacation, by way of ſummons, before a judge; and the parties undertaking to be bound, and concluded, in all the actions, by the fate of the verdict in the action brought againſt the firſt defendant, and to bring no writ of error, the court will ſtay all the proceedings in the laſt actions, until further order; but all the rules muſt be paid for ſeparate, as alſo the ſummonſes, and orders thereon, and if the verdict is in favour of the plaintiff, the plaintiff may proceed to tax his coſts on that verdict, and get the defendant's attorney to attend the maſter, who will tax the coſts in the other actions, which if complied with, (as is uſual), and they are not paid with the debt; the court may be moved upon an affidavit of the facts, for leave to enter up the judgment, and take out execution thereon, and that the maſter may tax the coſts in all the cauſes, and for the coſts of the application; after the coſts are taxed, they are to be paid within a limitted time by the court, if not, the judgments may be ſigned upon a double half-crown ſtamp, and execution taken out thereon.

Of Suggeſtions.

Moſt of the ſtatutes erecting courts of requeſt in various places, for the trial of actions under forty ſhillings, contain a clauſe giving, the defendant in caſe the plaintiff ſues in a ſuperior court, and recovers leſs then forty ſhillings, his coſts either ſingle or double.

The rule on the ſuggeſtion, orders that unleſs the plaintiff ſhall plead thereto within the time limitted, by

by such rule the matter suggested shall be taken to be true, and the officer is to allow such costs as the statute on which the suggestion is founded directs.

Suggestion on the declaration of the death of one of the plaintiffs after writ sued out.

Middlesex to wit. *William White*, complains of *Benjamin Black*, being, &c. in a plea of trespass on the case, for that whereas, the *Benjamin Black*, on the day of in the year of our Lord one thousand seven hundred and eighty-three, to wit, at Westminster, &c. was indebted to the said *William White*, and one *Richard Red*, his partner, (which said *Richard Red*, the said *William White* suggests to the the court here according to the form of the statute in such case made and provided since the issuing of the writ of *latitat* against the said *Benjamin Black*, at the suit of them the said *William White*, and *Richard Red*, to wit, on the day of in the year aforesaid, at Westminster aforesaid, in the county aforesaid, died, and the said *William White* survived him, which the said *Benjamin Black* doth not deny), in fifty pounds of lawful money, &c. for divers goods, wares and merchandizes by the said *William White* and *Richard Red* in his life time before that time sold, &c.

Suggestion of the death of one of the plaintiffs after issue joined.

The issue goes on to "the same day is given to the parties aforesaid at the same place," it then proceeds "before which day, to wit, on the day of in the year aforesaid, at London aforesaid, in, &c. the said *William White* suggests to the court here, according to the form of the statute in such case made and provided, that the said *Richard Red* died, and the said *William White* survived him, which the said defendant doth not deny: and the said defendant by his said attorney came, but the said sheriff did not send the said writ, nor did he

do any thing thereon, therefore as before it is commanded to the said sheriff, that he cause to come before our said lord the king, at Westminster, on next after twelve, &c. by whom, &c. and who neither, &c.

Suggestion of the death of one of the defendants after verdict.

After the *postea*, " and upon which the said plaintiff says, that after the last continuance of the plea aforesaid, to wit, on the day of in the year aforesaid, at, &c. in the county aforesaid, the said *John* died, and this is not denied, therefore let all farther proceedings against the said *John* cease, whereupon the said plaintiff prays judgment against the said *Benjamin*, for the damages, costs, and charges aforesaid by the jury aforesaid in form aforesaid assessed, to be adjudged to him, &c. therefore it is considered, &c.

Upon a writ of error it appeared that the death of *Rebecca Savil Far*, was suggested in the *jurata* of the record of *nisi prius*, and not in the usual way, and afterwards the death was suggested upon the roll in the usual way. The error assigned was, " that there is no record of *nisi prius*, and that judgment is given for the plaintiff below, whereas it ought to have been given for the defendant," then a *certiorari* issued, to certify the record of *nisi prius*, which was done, and in *nullo est erratum* pleaded by defendant in error, the objection taken was, that it ought to have been suggested upon the *nisi prius* record, and that it is not sufficient in the *jurata*. Lord Mansfield—The suggestion, award, and all the proceedings shew one of the defendants to be dead; and there is an award for the proceedings to stay, as to this defendant; and to go on, against the other one, and the jury is awarded as against the living one, the other being dead; both were alive when the issue was joined, a day was given to the parties, one defendant is awarded to come, the other not, and the sheriff doth not return the writ, and a *new venire* awarded to try the issue against the surviving defendant

dant, and it is properly awarded upon the issue roll, and acknowledged. The *nisi prius* roll is only for the direction of the judge, to try it; and it is not traversable on the roll, the judgment is right enough. 1 *Burr.* 363.

If in any action of debt, or action upon the case upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the city of London, in any of the king's courts at Westminster or elsewhere, out of the court of requests, it shall appear to the judge where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to forty shillings, and the defendant in such action shall duly prove, either by sufficient testimony or his own oath, to be allowed by any judge or judges of the said court, that at the time of the commencing such action, such defendant was inhabiting and residing in the city of London, or the liberties thereof, that in such case the said judge shall not allow the plaintiff any costs of suit, but shall award him to pay costs to the defendant. 3 *Jac.* 1. *c.* 15. *s.* 4.

It shall and may be lawful to and for every citizen and freeman of the city of London, and every other person or persons who do, or shall rent or keep any shop, shed, stall, or stand, or seek a livelihood, in the said city or liberties thereof, which now have or shall hereafter have any debts owing, not exceeding forty shillings, by any persons whatsoever, inhabiting, or seeking a livelihood, within the said city or liberties thereof, during their respective inhabiting within the said city, &c. or seeking a livelihood as aforesaid, to cause such debtor to be summoned to appear before the commissioners, &c. 14 *Geo.* 2. *c.* 10. If the plaintiff does not recover the sum of forty shillings against any of the persons above described, the defendant may the next term after verdict, apply to the court upon affidavit, "That he was at the time of the commencing the action, an inhabitant and resident within the city, &c." for a rule to shew cause "why a suggestion should not be entered upon the

the record," purſuant to the ſtatute 3 *Jac.* 1. Counſel's fee 10*s.* 6*d.* rule 5*s.* a copy of which is to be ſerved on the plaintiff's attorney, and if no cauſe ſhewn, on affidavit of the ſervice thereof, the defendant may move to make it abſolute, counſel one guinea, coſts on this rule are to be taxed with the maſter upon his appointment.

But if the defendant ſuffers judgment to go by default; he ſhall not be entitled to a ſuggeſtion, for not being in court, he ſhall not be received for that purpoſe. *Brampton* v. *Crabb*, *Str.* 46.

But where after a verdict for thirty ſhillings the defendant made ſuch a ſuggeſtion, which was urged on demurrer, the court held it to be well ſuggeſted after verdict. *Pennel* v. *Well*, *Mich.* 9 *W.* 3.

The coſts of the application ſhall be allowed in the taxation, as well as of the former proceedings. *Str.* 1120.

It muſt appear by the affidavit to ground the ſuggeſtion, that the plaintiff and defendant are citizens of London, and that the cauſe of action aroſe within the city. 1 *Wilſ.* 20. 2 *Wil.* 68. and its not diſcretionary in the court, but they are bound to grant the ſuggeſtions. *Ibid.*

A ſuggeſtion entered with leave of the court, after a verdict for the plaintiff, under forty ſhillings, is traverſable or demurrable to by the plaintiff. *Barn.* 470, 471. *Stra.* 46.

The original demand was fifteen pounds, the defendant gave notice of ſet off, but took no advantage under it, proving on the trial payments in part which reduced the debt to one pound, thirteen ſhillings, which the jury gave in damages. Rule to ſhew cauſe why the defendant ſhould not have leave to enter a ſuggeſtion purſuant to the ſtat. 1 *W.* & *M.* erecting courts of conſcience in Briſtol, Glouceſter, &c. made abſolute. *Barnes* 573.

If the debt was at the commencement of the action above forty ſhillings, and the defendant pleads or gives in evidence, a ſet off, and the plaintiff has a verdict for the balance, under forty ſhillings, the defendant cannot make a ſuggeſtion.

Chap. XLII.

Of Arbitration.

ARBITRATION, is where the contending parties, injuring and injured, ſubmit the matters in diſpute to the judgment of two or more arbiters or arbitrators, who are to decide the controverſy: and if they do not agree, it is uſual to add, that another perſon be called in as umpire (*imperator* or *impar Whar. Angl. Sac.* 1772.) to whoſe ſole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This deciſion, in any of theſe caſes is called an award. And thereby the queſtion is as fully determined, and the right transferred or ſettled, as it could have been by the agreement of the parties, or the judgment of a court of juſtice. *Brownl.* 554. 1 *Frem.* 410.

Originally the ſubmiſſion to arbitration was by word or deed, but both of theſe being revocable in their nature, it is now uſual to enter into mutual bonds, with condition to ſtand to the award of the arbitrators or umpire therein named; and as experience has ſhewn the uſe of theſe domeſtic tribunals, eſpecially in matters of account, and other mercantile tranſactions, which it is almoſt impoſſible to adjuſt on a trial at law, by the ſtat. 9 & 10 *W.* 3. *c.* 15. after reciting that,

It has been found by experience, that references made by rule of court have contributed much to the eaſe of the ſubject in determining controverſies; becauſe the parties become thereby obliged to ſubmit to the award of the arbitrators under the penalty of impriſonment for their contempt in caſe they refuſe ſubmiſſion, now for promoting trade and rendering the awards of arbitrators more effectual in all caſes referred to them by merchants or traders, or others, concerning matters of account, or other matters, it is enacted:

That

That it ſhall and may be lawful for all merchants and traders, and others deſiring to end any controverſy, ſuit, or quarrel, or controverſies, ſuits, or quarrels, for which there is no other remedy but by perſonal action or ſuit in equity, by arbitration, to agree that their ſubmiſſion of their ſuit to the award or umpirage of any perſon or perſons, ſhould be made a rule of any of his majeſty's courts of record, which the parties ſhall chuſe; and to inſert ſuch agreement in their ſubmiſſion, or the condition of the bond or promiſe, whereby they oblige themſelves reſpectively to ſubmit to the award or umpirage of any perſon or perſons, which agreement being ſo made and inſerted in their ſubmiſſion or promiſe, or the condition of their reſpective bonds, ſhall or may, upon producing an affidavit thereof, made by the witneſſes thereto, or any one of them, in the court of which the ſame is agreed to be made a rule of court, and reading and filing the ſaid affidavit in court, be entered of record in ſuch court; and a rule ſhall be thereupon made by the ſaid court, that the parties ſhall ſubmit to and be finally concluded by the arbitration or umpirage which ſhall be made concerning them by the arbitrators or umpires, purſuant to ſuch ſubmiſſion; and in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform and execute the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court, when he is a ſuitor or defendant in ſuch court; and the court on motion ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution by any order, rule, command, or proceſs, of any other court, either of law or equity, unleſs it ſhall be made appear, on oath, to ſuch court, that the arbitrators, or umpire, miſbehaved themſelves; and that ſuch award, arbitration, or umpirage, was procured by corruption, or other undue means.

That any arbitration, or umpirage, procured by undue means, ſhall be judged and eſteemed void and of none effect, and accordingly be ſet aſide by any court of law or equity, ſo as complaint of ſuch corruption, or undue practice, be made in the court where

where the rule is made for ſubmiſſion to ſuch arbitration or umpirage, before the laſt day of the next term after ſuch arbitration or umpirage, made and publiſhed to the party. 9 & 10 *W. c.* 15.

The limitation in this ſtatute of the time of impeaching awards to the laſt day of the next term, takes place only when the ſubmiſſion is by obligation, and where it is in purſuance of a rule of *niſi prius*.

This act was made to put ſubmiſſion where no cauſe is depending in court, on the ſame footing with thoſe where there is a cauſe depending, and is only declaratory of what the law was before in the other caſe. *Burr.* 4 *pt.* 70.

It is in conſequence of this ſtatute, now become a conſiderable part of the buſineſs of the ſuperior courts to ſet aſide ſuch awards when partially or illegally made; or to enforce their execution, when legal, by the ſame proceſs of contempt as is awarded for diſobedience to thoſe rules and orders which are iſſued by the courts themſelves.

Where an award is made a rule of court it ſhall not be ſet aſide, unleſs there was practice with the arbitrators, or ſome irregularity, as want of notice of the meeting; alſo you ſhall not take exception to the formality of it, but perform it. *Per Holt, Ch. J. Salk.* 71.

The only ground to impeach an award is, colluſion, or groſs miſbehaviour of the abritrators, or otherwiſe it is final and binding upon all parties, otherwiſe no perſons would ever undertake to be arbitrators. 3 *Atk.* 529.

The court will not enter at all into the merits of the matter referred to arbitration, but only take into conſideration ſuch legal objections as appear upon the face of the award, and ſuch objections as go to the miſbehaviour of the arbitrators. 2 *Burr.* 701.

If the arbitration is in conſequence of a rule of *niſi prius*, by which, by the conſent of the parties, matters in diſpute are often at the recommendation of the court, ordered to be referred to arbitration. When the award is made, the arbitrator, or his attorney, ſhould give notice to the attorney on each ſide,

ſide, that the award is ready for delivery, and that each of the litigants may have his part on paying for ſame. If the party in whoſe favour it is, accept his part, and the other refuſes to accept his, that part of the award ſhould be tendered to him, in order that a rule of court may be obtained on an affidavit of the tender, and refuſal to make the order of *niſi prius* a rule of court, a copy of which muſt be ſerved on the party refuſing to accept ſuch award.

If a cauſe at *niſi prius* in London or Middleſex, is referred by conſent, application muſt be made to the clerk of *niſi prius* for the order of *niſi prius*, and the reſpective attornies ſhould ſet down the names of the witneſſes propoſed to be examined, and deliver them to the crier, who will ſwear them at the bar of the court, paying 2*s.* each witneſs. If not ſworn in court, they muſt attend a judge for that purpoſe.

If a cauſe is referred on a circuit, the aſſociate draws up, and enters the order of *niſi prius*.

The arbitrator ſhould appoint the time and place of arbitration in writing; it is uſual for the plaintiff's attorney to ſubſcribe it to the copy of the order of reference ſerved on the defendant, or his attorney, and the arbitrator ſhould have ſhort briefs of the caſe on each ſide.

The time limited in the order may be enlarged on motion, on which the court will grant a rule for that purpoſe.

If the award be in purſuance of an agreement in a bond of arbitration, that the ſubmiſſion ſhould be made a rule of court, and either party refuſing to perform the award, an affidavit muſt be made of the due execution, and alſo of that of the award.

Affidavit of the due execution of the bond.

A. B. of, &c. maketh oath, and ſaith, that he was preſent at the time of ſigning and ſealing the bond or obligation hereunto annexed, and *Benjamin Black* of, &c. therein mentioned, did duly ſign, ſeal, and as his act and deed, deliver the ſaid bond, in the preſence of this deponent, and that the name *Benjamin Black*

Black, ſet and ſubſcribed oppoſite the ſeal of the ſaid bond, is of the proper hand writing of the ſaid *Benjamin Black*, and that the name *A. B.* ſet and ſubſcribed as the witneſs thereto, is of the proper hand-writing of this deponent.

Affidavit of the due execution of the award, to be made by one of the witneſſes.

A. B. of, &c. gentleman, maketh oath and ſaith, that he did ſee *Richard Red* of, &c. ſign, ſeal, publiſh and declare his final award and arbitrament between *William White* of, &c. gentleman, and *Benjamin Black* of, &c. gentleman, bearing date the day of one thouſand, ſeven hundred, and eighty-three; and this deponent further ſaith, that the name *Richard Red*, ſet and ſubſcribed againſt the ſeal as the party executing the ſaid award, is of the proper hand-writing of the ſaid *Richard Red*, and that the names of *A. B.* and *C. D.* ſet and ſubſcribed thereto as witneſſes, atteſting the execution of the ſaid award, are of the reſpective hand-writing of this deponent, and the ſaid *C. D.*

Affidavit of the ſubmiſſion by deed.

A. B. of, &c. gentleman, maketh oath and ſaith, that he was preſent at the time of ſigning and ſealing a certain deed or inſtrument in writing, bearing date the firſt day of May, one thouſand, ſeven hundred, and eighty-three, and made between *William White* of, &c. of the one part, and *Benjamin Black* of, &c. of the other part, whereby (amongſt other things) it was agreed, that all matters in diſpute between them, touching and concerning any diſputes or controverſies on their partnerſhip account, ſhould be referred to the award, arbitrament, final end and determination of, &c. (naming the arbitrators), and ſuch other perſon as they ſhould appoint, arbitrators indifferently named and appointed by and between the ſaid parties, to arbitrate, adjudge and determine all matters which might happen to ariſe, or be in diſ-

pute or controverſy between them; and that the award or awards, arbitration or arbitrations, which ſhould be from time to time made by the ſaid arbitrators, or any two of them, in writing, ſhould be final, binding and concluſive between the ſaid parties; and each of them agreed to ſtand to, abide, and perform, the ſame in every particular and reſpect; and that his ſubmiſſion thereto, ſhould be made and entered a rule of his majeſty's court of king's bench, at Weſtminſter, and that the power of the arbitrators ſhould continue until all the affairs and concerns of their co-partnerſhip ſhould be fully ſettled, and that the ſaid *William White* and *Benjamin Black*, reſpectively ſigned, ſealed and delivered, the ſaid deed or inſtrument in the preſence of this deponent, as their proper act and deed, and that the name *A. B.* ſet and ſubſcribed as the witneſs thereto, is of the proper hand-writing of this deponent.

The affidavit is to be ingroſſed on a treble ſixpenny ſtamp paper, and given to counſel to move to make the ſubmiſſion a rule of court, fee 10*s.* 6*d.* if on deed, it is taken to the clerk of the rules, paying him 8*d.* *per* ſheet for the copy beſides ſtamps, and a copy thereof ſerved on the party perſonally, ſhewing him the original rule, at the ſame time the perſon who is to receive the money, if any money is ordered to be paid by the award, muſt demand the ſame; and on non-payment, make affidavit thereof, to move for an attachment.

Affidavit of non-payment of money awarded.

William White of, &c. gentleman, maketh oath and ſaith, that he this deponent did, on the day of laſt, perſonally attend from the hour of one until the hour of two of the clock in the afternoon of the ſame day at the Inner Temple Hall, London, in order to receive of *Benjamin Black* in a certain award in writing, hereunto annexed mentioned, the ſum of fifty pounds, awarded due to this deponent, purſuant and agreeable to the ſaid award, but the ſaid *Benjamin Black*

Black did not then pay to this deponent the ſaid ſum of fifty pounds, or any part thereof; and this deponent further ſaith, that having on next, after in this preſent term, cauſed the ſubmiſſion of this deponent, and the ſaid *Benjamin Black*, to the ſaid award contained in certain articles of agreement, bearing date the day of one thouſand ſeven hundred and eighty-three, to be made a rule or order of this honourable court, he this deponent on the day of ſerved the ſaid *Benjamin Black* with a true copy of the ſaid rule or order of this honourable court, and at the ſame time ſhewed him the ſaid original rule or order; and this deponent further ſaith, that he did at the ſame time demand of him the ſaid *Benjamin Black* the ſaid ſum of fifty pounds, ſo awarded due to this deponent as aforeſaid; but the ſaid *Benjamin Black* did not pay the ſame to this deponent, and this deponent further ſaith the whole of the ſaid ſum of fifty pounds now remains due and owing to this deponent purſuant to the ſaid award.

This affidavit is to be given to counſel, "to move for an attachment for not paying the money on the award in purſuance of a rule of court," fee 10*s.* 6*d.* it is a rule to ſhew cauſe, a copy of which muſt be ſerved on the party, and on affidavit of the ſervice, it will on motion, if no cauſe ſhewn, be made abſolute, fee to counſel 1*l.* 1*s.* rule 5*s.* which is taken to the crown-office to a clerk in court, who will make out an attachment, fee 13*s.* 4*d.* a warrant is then had thereon, officer, 1*l.* 1*s.* for the caption.

Whether the award on reference by order of *niſi prius*, is in favour of plaintiff or defendant, coſts are of courſe given as to the ſuit by the rule, therefore notice is to be given to the attorney on the other ſide of the time of taxing them, and on attending the maſter, he will do it on the order of *niſi prius*, paying 4*s.* no ſtamp is requiſite thereon; and if the party againſt whom the award is, does not pay the money and coſts at the time and place mentioned in the award, on having attended for that purpoſe (and the order

of *nisi prius* is not made a rule of court) a brief must be given to counsel to make it so, fee 10*s*. 6*d*. rule 16*s*. a copy of which must be served with the master's *allocatur* thereon, and a copy of the award annexed; on demand of the sum awarded and costs if not paid, the party is to move on the following affidavit for an attachment.

Affidavit of service of rule and allocatur *of costs and the demand of the money.*

In the king's bench, between

William White, plaintiff,
Benjamin Black, defendant.

William White, of &c. gentleman, the plaintiff in this cause, maketh oath and saith, that he this deponent did, on the day of last, personally serve the above defendant, with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the original rule, *allocatur* and award, and demanded of him the said defendant the payment of the sum of fifty pounds, awarded due to this deponent by *Richard Red*, of, &c. the arbitrator named in the said award, and also the payment of the sum of fifteen pounds, for the costs mentioned, and allowed to him the said plaintiff in the said cause; but the said *Benjamin Black* refused to pay the same, or any part thereof, and the same still remain due, and owing from the said *Benjamin Black* to this deponent.

The court held that they could not on the statute receive any complaint to set aside an award, till the submission was made a rule of court, and that a consent in the bond to make the award a rule of court instead of the submission, would not warrant their interference, *Harrison* v. *Gundry*, *Stra*. 1178.

The court will compel a witness to make an affidavit of the execution of the bond or agreement. *Singleton* v. *Bradly*, *Hil*. 6 *Geo*. 2.

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An attachment for non performance of an award cannot be granted upon the affirmation of a quaker, for although it is a ſuit between party and party, yet an attachment is a criminal proſecution within the proviſo of the ſixth ſection of 7 & *W.* 3. *c.* 34.

Rudd v. *Coe.* On motion on behalf of Rudd, that the ſubmiſſion contained in the condition of an arbitration bond, might be made a rule of court, the bond was produced, executed by Coe. *Per Cur.* Be it ſo, Coe's conſent is ſhewn by the bond executed by him, and the motion is on behalf of Rudd. *Barnes* 55.

Where a matter is referred to arbitartors by rule of court, and they make their award, the court will compel a performance, as much as if the award were part of the rule, and a new rule is needleſs. *Salk.* 71.

No reference of any cauſe in this court ſhould ſtay proceedings, unleſs it was expreſſed in the rule of reference, to be agreed that all proceedings ſhould ſtay. *Ld. Raym.* 789.

Upon an award made a rule of court, the party may proceed both by attachment and action at the ſame time. 1 *Keb.* 130, 138. *Salk.* 73.

It is diſcretionary in the court to grant proceſs of contempt for not executing an award, *Stra.* 695. as the plaintiff is not without remedy by an action upon the award.

Rule of *niſi prius* to refer to an award, made a rule of court, and motion for an attachment for non-performance. Inſiſtad, *contra*, that the arbitrators had not purſued their authority, becauſe the ſubmiſſion confined the award to be made in writing, indented; and the award produced was not indented, *Per Cur.* This is an immaterial objection, and juſt the ſame as if the ſubmiſſion had ſaid that the award ſhould be made on gilt paper. Let an attachment go. *Barnes* 55.

A matter was referred, by conſent, to the three gentlemen of the jury, and before the award was made one of the parties ſerved the arbitrators with a *ſubpoena* out of chancery, which prevented the proceeding

to

to make the award; and the court held this a breach of the rule, and granted an attachment *nisi*. Davila *v.* Almanza, Salk. 73.

Upon affidavit that the original award was loſt in the Briſtol mail, which was robbed, an attachment was moved upon a copy of it, and granted *niſi*.

Upon a ſubmiſſion to the award of the three foremen of the jury who made their award, the defendant moved to ſet it aſide, becauſe they went on without giving him time to be heard, or produce a witneſs. And Holt, chief juſtice, denied the diverſity. He ſaid, the arbitrators being judges of the parties own chuſing, the party ſhould not come and ſay, they have not done him juſtice, and put the court to examine it; *aliter*, when they exceed their authority. However, the award was examined and confirmed, and the plaintiff moved for an attachment for the not performing it; and the court held, that the non-performance, whilſt the matter was *ſub judice*, was no contempt. The plaintiff moved for his coſts, and that was denied; upon which Powell, juſtice, ſaid, That ſeeing they could not give the party coſts, he ſhould never be for examining into awards again. *Norris* v. *Reynolds*, *Salk.* 73. *Ld. Raym.* 857

Matters in difference, by conſent of parties referred to three arbitrators, ſo as they, or any two of them, make an award; and award having been made by two, in the plaintiff's favour, the defendant moved to ſet it aſide, objecting, that the two had not a juriſdiction without the third. Rule, to ſhew cauſe when it appeared, that the third arbitrator had ſufficient notice of the meeting, and might have been preſent if he would. *Per Cur.* It is agreed, that if the third had met, two might have made the award; two have a juriſdiction, but muſt proceed according to rule of law. If the third had been preſent, his reaſons might have altered the opinion of the other two; he is not therefore to be excluded by fraud, nor are the two to act without the third's having an opportunity to be preſent; but when the third has ſufficient notice, as in this caſe, and will not attend the meeting, the meeting of the two is regular, and the

their authority ſufficient. *Dalling* v. *Matchett*, *Barnes* 57.

If there is a parol ſubmiſſion to an award, the remedy for the non-performance, is by action on the caſe, there was formerly a difference where money was awarded, and where a collateral matter upon a parol ſubmiſſion, for the law was then taken where a collateral matter was awarded, the plaintiff had no remedy on a parol ſubmiſſion, as he had when money was awarded, for then he might have debt; but as the law now is, the party might have an action on the caſe for the breach of promiſe, for the ſubmiſſion is an actual promiſe to perform the award, and is now held ſufficient evidence to maintain the action; and if ſo it is within the ſame reaſon as when the ſubmiſſion is by bond, and a collateral matter is awarded; or, when upon a parol ſubmiſſion money is awarded, in which caſes the award is a good plea without performance, in regard the party has remedy to compel it. *Lord Raym.* 1040.

Chap. XLIII.

Of the trial of feigned Iſſues.

THE courts of equity are ſo ſenſible of the deficiency of the trial, by written depoſitions, according to the courſe of the proceedings in thoſe courts, that when any fact is abſolutely controverted by the parties, ſuch courts are not held competent to the deciſion, which is held to be the proper province of a jury, whoſe verdict will inform the conſcience of the court. Thus the validity of a will. The execution of a deed or other writing. The queſtion whether *A.* is the heir at law of *B.* the exiſtence of a *modus demandi*, and the like queſtions of fact are, as no jury can be ſummoned to attend the chancery, or the equity court, in the exchequer, uſually ſent to be tried by the court of chancery, to the king's bench, and by the court of exchequer to the law ſide of their

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own court upon a feigned iſſue, wherein the plaintiff declares, that he laid a wager of five pounds with the defendant, that *A.* was heir at law to *B.*; (or as the caſe is,) and then avers that he is ſo; and brings his action for the five pounds. The defendant allows the wager, but avers that *A.* is not the heir to *B.*; and thereupon the iſſue is joined.

The order directing the iſſue alſo directs who is to be plaintiff and defendant, and alſo that the attorney for the defendant ſhall forthwith appear and plead. A writ is taken out in the common way, and all the proceedings are as in common caſes, except that there is no imparlance allowed; the order being to plead forthwith.

The courts of law do alſo frequently make uſe of feigned iſſues, which ſaves all the formality of pleading, and a great expence to the parties.

But if a queſtion of mere law ariſes in the courſe of a cauſe, as whether by the words of a will an eſtate for life or in tail is created, or whether a future intereſt deviſed by a teſtator ſhall operate as a remainder, or an executory deviſe; it is the practice of the court of chancery, to refer it to the court of king's bench or common pleas, upon a caſe ſtated for that purpoſe; wherein all the material facts are admitted, and the point of law is ſubmitted to their deciſion, who thereupon hear it ſolemnly argued by counſel on both ſides, and certify their opinion to the chancellor.

To proceed therefore in this manner, a caſe is ſettled by counſel on both ſides, and ſigned; a *concilium* moved for the ſame as on a demurrer; the caſe ſet down, and a copy of the caſe as ſettled delivered to the judges.

Declaration on a feigned iſſue, to try the validity of a will.

Middleſex to wit. *William White* complains of *Benjamin Black*, being in the cuſtody of the marſhal of the Marſhalſea, &c. For that whereas on the day of in the ye

year of our Lord one thouſand, ſeven hundred, and eighty-three, to wit, at Weſtminſter, in the ſaid county, a certain diſcourſe was moved and had, by and between the ſaid *William White* the now plaintiff, of the one part, and the ſaid *Benjamin Black* of the other part, of and concerning a certain freehold meſſuage with the appurtenances, ſituate at in the county of late the eſtate of one *John White* deceaſed, and of which freehold eſtate the ſaid *John White* deceaſed, before and on the day of in the year one thouſand ſeven hundred and eighty, was ſeiſed in demeſne, as of fee, and afterwards died ſeiſed thereof, and alſo of and concerning a certain paper writing, dated the day of in the ſaid year one thouſand ſeven hundred and eighty, purporting in itſelf, to be the laſt will and teſtament of the ſaid *John White* deceaſed, and whether the ſaid *John White*, deceaſed, did by the ſaid paper writing, ſo purporting as aforeſaid, deviſe the ſaid freehold eſtate (among other things) or not to the ſaid *William White*, the now plaintiff, and upon that diſcourſe the ſaid *William White*, the now plaintiff, then and there aſſerted and affirmed, that the ſaid *John White* deceaſed, did by the ſaid paper writing, dated the ſaid day of in the year one thouſand ſeven hundred and eighty, deviſe the ſaid freehold eſtate to him, which ſaid aſſertion and affirmation of the ſaid *William White* the now plaintiff, he the ſaid *Benjamin Black*, then and there wholly denied, and then and there alledged the contrary thereof, and thereupon afterwards, to wit, on the ſaid day of in the year one thouſand ſeven hundred and eighty-three, aforeſaid, at aforeſaid, in the county aforeſaid, the ſaid *William White*, the now plaintiff, at the ſpecial inſtance and requeſt of the ſaid *Benjamin Black* undertook, and then and there promiſed him to pay him the ſum of five pounds, in caſe the ſaid *John White* deceaſed, did not by the ſaid paper writing, dated the day of in the year one thouſand, ſeven hundred and eighty, deviſe the ſaid freehold

freehold eſtate (amongſt other things) to him as aforeſaid, and in conſideration thereof, he the ſaid *Benjamin Black* then and there undertook, and faithfully promiſed the ſaid *William White* the now plaintiff, to pay him the ſum of ten pounds, in caſe the ſaid *John Black* deceaſed, did by the ſaid paper writing, dated the day of in the year one thouſand, ſeven hundred and eighty, deviſe the ſaid freehold eſtate (amongſt other things) to the ſaid *William White*, the now plaintiff as aforeſaid, and the ſaid *William White*, the now plaintiff avers, that the ſaid *John White* deceaſed, did by the ſaid paper writing, dated the day of in the year one thouſand, ſeven hundred and eighty, deviſe the ſaid freehold eſtate (amongſt other things) to him as aforeſaid, to wit, at aforeſaid, in the county aforeſaid, whereof the ſaid *Benjamin Black* afterwards, to wit, on the ſaid day of in the year one thouſand, ſeven hundred and eighty-three aforeſaid, at aforeſaid, had notice, by means whereof, he the ſaid *Benjamin Black* according to the tenor of his promiſe and undertaking as aforeſaid, became liable to pay, and ought to have paid the ſaid ſum of ten pounds to the ſaid *William White* the now plaintiff, to wit, at aforeſaid, in the county aforeſaid; yet the ſaid *Benjamin Black* not regarding his ſaid promiſe, and undertaking ſo by him made in this behalf as aforeſaid, but contriving, and fraudulently intending, craftily and ſubtilly, to deceive and defraud the ſaid *William White* the now plaintiff, in this behalf, hath not yet paid the ſaid ſum of ten pounds, or any part thereof, to the ſaid *William White* the now plaintiff, although ſo to do he the ſaid *Benjamin Black* was requeſted by the ſaid *William White* the now plaintiff, afterwards, to wit, on the ſaid day of in the year one thouſand, ſeven hundred and eighty-three aforeſaid, and often afterwards, to wit, at aforeſaid, in the county aforeſaid: But he to pay the ſame, or any part thereof to the ſaid *William White* the now plaintiff, hath hitherto wholly refuſed, and ſtill refuſes to pay the ſame, or any part thereof, to him

him the ſaid *William White* the now plaintiff; to the ſaid *William White* the now plaintiff, his damage of twenty pounds, and therefore he brings ſuit, &c.

Plea.

And the ſaid *Benjamin Black* by *C. D.* his attorney, comes and defends the wrong and injury, when &c. and ſays, that true it is, that ſuch diſcourſe was moved and had, by and between the ſaid *William White* the now plaintiff, and the ſaid *Benjamin Black*, as is above-mentioned in the ſaid declaration, and that he the ſaid *Benjamin Black* did undertake and promiſe, in manner and form as the ſaid *William White* the now plaintiff, hath above thereof complained againſt him: but the ſaid *Benjamin Black* ſaith, that the ſaid *William White* the now plaintiff, ought not to have his aforeſaid action thereof maintained againſt him; becauſe he ſays, that the ſaid *John White* deceaſed, did not by the ſaid paper writing, dated the day of in the year one thouſand, ſeven hundred and eighty, deviſe the ſaid freehold eſtate (amongſt other things) to him the ſaid *William White* the now plaintiff, as aforeſaid, and of this he puts himſelf upon the country: and the ſaid *William White* doth the like, &c.

Chap. XLIV.

Of popular Actions.

THE forfeitures enacted by ſtatute, are uſually given to any ſuch perſon or perſons as will ſue for the ſame, and hence ſuch actions are called popular actions, becauſe given to the people in general, ſometimes one part is given to the king, to the poor, or ſome public uſe, and the other part to the proſecutor, and then the ſuit is called a *qui tam* action, becauſe it is brought by a perſon, "*qui tam pro domino rege, &c. quam pro ſe ipſo in hac parte ſequitur.*" If the king

therefore commences the ſuit, he ſhall have the whole forfeiture; but if any one hath began a *qui tam* or popular action, no other perſon can purſue it, and a verdict againſt the defendant in the firſt ſuit, is a bar to all others, even to the king himſelf; but by the 4 *Hen.* 7. *c.* 20. no recovery other than by verdict obtained by colluſion in an action popular, ſhall be a bar to any other action proſecuted *bona fide*, and for redreſſing of divers diſorders in common informers, and for better execution of penal laws, it is enacted by the 18 *Eliz. c.* 5. That if any ſuch informer or plaintiff ſhall willingly delay his ſuit, or ſhall diſcontinue or be nonſuit, or ſhall have the trial or matter paſs againſt him by verdict or judgment of law, ſuch informer or plaintiff ſhall yield, ſatisfy, or pay the party defendant, his coſts, charges and damages to be aſſigned by the court in which the ſame ſuit ſhall be attempted, for the recovery whereof ſuch defendant ſhall have his *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*, to be awarded to him, as in other caſes of execution, provided this ſtatute ſhall not extend to any officer who in reſpect of his office has heretofore uſed to ſue upon penal laws, nor to officers ſuing for matters only concerning their office, That no informer, or plaintiff, ſhall or may compound or agree with any perſon or perſons, that ſhall offend, or that ſhall be ſurmiſed to offend againſt any penal ſtatute, for any offence committed or pretended to be committed; but after anſwer made in court unto the information or ſuit, in that behalf exhibited or proſecuted: nor after anſwer, but by the order or conſent of the court, in which the ſame information or ſuit ſhall be depending. That any perſon who ſhall offend, in making of compoſition or other miſdemeanor, contrary to the true intent and meaning of this ſtatute, or ſhall by colour or pretence of proceſs, or without proceſs upon colour or pretence of any matter of offence againſt any penal law, make any compoſition, or take any money, reward, or promiſe of reward, for himſelf, or to the uſe of any other, without order or conſent of ſome of her majeſty's courts at Weſtminſter

minſter, and ſhall be thereof convicted, ſhall ſtand on the pillory, &c. and for ever be diſabled to purſue, or be plaintiff or informer in any ſuit or information, upon any ſtatute, popular or penal: and ſhall alſo forfeit ten pounds, &c.

Provided alſo, That this act ſhall not extend to any ſuit already depending, nor ſhall reſtrain any certain perſon, body politic or corporate, to whom or to whoſe uſe any forfeiture, penalty or ſuit is, or ſhall be ſpecially limitted or granted by virtue of any ſtatute, and not generally to any perſon that will ſue, but that every ſuch certain perſon, body politic or corporate, which might ſue or inform, if this act were not made, may in ſuch caſe ſue, inform and purſue, as he or they might have done, if this act were never had or made.

This ſtatute extends to one ſuing on a repealed ſtatute, for the vexation is the greater, to one ſuing in a court not having juriſdiction, and to ſubſequent penal ſtatutes as well as thoſe which were in being when it was made.

It ſeems clear both from the preamble and the whole tenor of this ſtatute, that it extends only to ſuits by common informers, and not to thoſe by a party grieved, 2 *Haw.* 279. but under the 4 *Jac.* 1. *c.* 3. the defendant ſhall have coſts of the party grieved, if by the ſtatute the party grieved would have had coſts had he prevailed.

In an action upon the ſtatute 18 *Eliz. c.* 15. againſt the defendant for making and ſelling gold rings, of leſs fineneſs than the ſtatute directs, it was moved for leave to compound, and a caſe was cited of *Bell qui tam*, v. *Wyate*, *Trin.* 1733, where there was no conſent, and yet the court in that caſe gave leave to compound, *per cur.* It is in the diſcretion of the court to give leave to compound, and afterwards they refuſed the motion. *Howell qui tam*, v. *Morris*, *B. R.* 1 *Wilſ.* 79.

Poole moved for leave to compound on the part of the proſecutor upon the ſtatute of gaming, upon an affidavit that the defendant and one *A. B.* uſed to play at cards together, and that the defendant had won

won divers ſums of money of *A. B.* that *A. B.* was become a bankrupt, and that the aſſignees, who ſet this proſecution on foot, were ſatisfied with reſpect to the defendant, and the court granted the motion, *Ibid.* 130.

The plaintiff brought a *qui tam* upon the ſtamp act againſt the defendant, for marrying without a licence; and had him in execution, where he had lain ſome time. And now Yorke cited 18 *Eliz. c.* 5. *ſ.* 3. and produced an affidavit of the poverty of the defendant, and had the leave of the court, that the plaintiff might compound with the defendant. *Bradſhaw* v. *Mottram*, 1 *Str.* 167.

Action on the ſtatute of uſury. Defendant pleaded. Motion by Draper for leave for the proſecutor to compound on the *ſtat.* 18 *Eliz.* Bootle conſented for the defendant; and a rule was made purſuant to the motion. *Barnes's Notes* 118, *Bland* v. *Featherſtone.*

This motion is made upon the affidavit of one of the parties, ſtating, "That an action is brought upon ſuch an act of parliament, and that the declaration contains penalties to the amount of that ſince the ſaid defendant has pleaded *nil debet*, and that the plaintiff and defendant have agreed to compound the ſame for the ſum of ."

This affidavit muſt be given to counſel, to move to compound, and the plaintiff muſt give a brief upon a ſlip of paper to conſent to the motion on payment of the ſum agreed. Before the clerk of the rules draws up the rule, the king's moiety muſt be paid to the maſter of the crown-office, and on his receipt being produced, the clerk of the rules will deliver the rule.

Chap. XLV.

Of proceeding in the caſe of Infants.

BY the laws of this country, the full age of male or female is twenty-one years, which age is compleated on the day preceding the anniverſary of the perſon's birth, *Salk.* 44. 625. *Lord Raym.* 480. 1096. *Toder* v. *Sanſam. Dom. Proc.* 27 *Feb.* 1775. Perſons are, until that time, infants, and ſo ſtiled in law.

But although the full age is twenty-one, the ſtate of infancy is diſtinguiſhed into various periods; thus a male at twelve may take the oath of allegiance; at fourteen is of diſcretion, and therefore may conſent or diſagree to marriage; and if his diſcretion be actually proved, make a teſtament of his perſonal eſtate, but is not until twenty-one entirely at his own diſpoſal, ſo as to be permitted to alien his lands, goods, or chattels. A female at ſeven may be betrothed, or given in marriage; at nine is entituled to dower; at twelve is of years of maturity, and therefore may conſent or diſagree to marriage; and if proved to have ſufficient diſcretion, may bequeath her perſonal eſtate; at fourteen is of years of legal diſcretion, and may chuſe a guardian; at ſeventeen may be executrix; and is of full age at twenty-one. This fixing the full age of male or female at twenty-one, is probably copied from the old Saxon conſtitution, which extends the age of minority *ad annum vigeſimum primum, et eo uſque juvenes ſub tutelam reponunt.* Sternhook de Jure Saxonum, l. 2. c. 2.

Infants have various diſabilities, or rather privileges, to ſecure them from hurting themſelves by their own improvident acts.

An infant cannot be ſued but under the protection, and joining the name of his guardian, for he is to defend him from all attacks at law or otherwiſe, *Co. Litt.* 135 but he may ſue, either by his guardian or his *prochein*

prochein amy, his next friend who is not his guardian. This *prochein amy* may be any perſon who will undertake the infant's cauſe; and it frequently happens in equity, that an infant inſtitutes a ſuit by his *prochein amy* againſt a fraudulent guardian; but in this court if an action is brought by an infant, he muſt, before declaration, get a guardian appointed by the court, for till then the defendant is not obliged to plead. 13 *Ed.* 1. *c.* 15.

Petition to aſſign a guardian.

In the king's bench.

William White, the younger, plaintiff;

Between and

Benjamin Black, defendant.

To the right honourable *William* earl Mansfield, lord chief juſtice of his majeſty's court of king's bench.

The humble petition of *William White*, the younger, an infant under the age of twenty one years, the plaintiff in this cauſe.

Sheweth,

That your petitioner has, as he is adviſed, good cauſe of action againſt the above-named *Benjamin Black* for aſſaulting, beating, wounding, and ill-treating your petitioner, and that your petitioner has ſome time ſince commenced an action againſt the ſaid *Benjamin Black* for the ſame, but in regard that your petitioner is an infant under the age of twenty-one years.

Your petitioner therefore moſt humbly prays your lordſhip, to aſſign unto him *William White* of, &c. gentleman, your petitioner's father, as and for your petitioner's guardian to proſecute the ſaid action againſt the ſaid *Benjamin Black*.

And your petitioner ſhall ever pray, &c.

William White

Unde

Under this petition which is to be engroſſed on a treble ſixpenny ſtamp, muſt be written the following acceptance.

"I do hereby agree to accept to be the guardian to the above-named *William White* an infant, according to the prayer of the above petition."

William White.

Witneſs, *A. B.* attorney for the plaintiff.

To which is to be annexed the following affidavit, ingroſſed on a treble ſixpenny ſtamp, and ſworn before a judge.

Affidavit.

In the king's bench. *William White*, plaintiff. and *Benjamin Black*, defendant.

A. B. of, &c. gentleman, attorney for the plaintiff in this cauſe, maketh oath and ſaith, that *William White* the younger, the above-named plaintiff did on the day of duly ſign the petition hereunto annexed, in the preſence of this deponent; and this deponent further ſaith, that he was alſo preſent, and did ſee *William White* the elder, the perſon mentioned in the ſaid petition, duly ſign the acceptance or agreement there under written, in order to his being a guardian to the ſaid *William White* the younger.

The petition and affidavit are to be taken to a judge's chambers, who will thereupon make his order for the plaintiff to proſecute by his guardian, paying 12*s.* which is taken to the clerk of the rules for a rule to be made thereon, for which is paid 5*s.* and a copy of the rule is to be annexed to the declaration.

The form of the declaration.

London to wit. *William White* the younger, by *William White* the elder, who is admitted by the court of our lord the king, before the king himſelf here, to proſecute for the ſaid *William White* the

younger, who is within the age of twenty-one years, as the next friend of the ſaid *William White* the younger, complains of &c.

The memorandum in the iſſue, runs " comes *William White* the elder, who is admitted by the court of our lord the king, before the king himſelf here to proſecute, &c."

In the *venire* and *diſtringas*, " *William White* the younger, by his next friend, plaintiff."

An infant cannot defend without a guardian, nor can he plead till a guardian is admitted, by ſome judge of the court.

But if he appear and plead by an attorney, and the plaintiff diſcovers it, he may in vacation-time apply to a judge for a ſummons, (or in term to the court) for a rule to ſhew cauſe " why common bail filed ſhould not be ſtruck out, and the plea be ſet aſide, and that the defendant may be obliged to appear by a guardian;" and if no one is named within ſix days, the plaintiff may name one for him, which will be ordered of courſe.

So if an infant executor be defendant, he muſt defend by guardian.

Petition to aſſign a guardian to defend.

William White, plaintiff,
In the king's bench. and
Benjamin Black, defendant

To the right honourable *William* earl Mansfield, lord chief juſtice of his majeſty's court of king's bench.

The humble petition of *Benjamin Black*, an infant under the age of twenty-one years,

Sheweth,

That the ſaid plaintiff hath lately commenced an action at law againſt your petitioner for (as the cauſe of action may be), and your petitioner is adviſed and believes

believes that he has a good defence to make thereto, but in regard your petitioner is an infant,

Your petitioner humbly prays your lordſhip would be pleaſed to aſſign *Richard Red* of, &c. as his guardian, to defend this ſuit.

And your petitioner ſhall ever pray,

Benjamin Black.

I do accept and agree to be the guardian of the ſaid *Benjamin Black* an infant, according to the prayer of the above petition. *Richard Red.*

Witneſs, *C. D.*

In caſe the guardian appears before the judge, there is no neceſſity for an affidavit of his acceptance; but if he does not, an affidavit muſt be made as before.

A copy of the rule is to be annexed to the plea, or ſerved on the plaintiff's attorney.

Plea by an infant.

And the ſaid *Benjamin Black*, by *Richard Red*, who is admitted by the court of our lord the king, before the king himſelf, to defend for the ſaid *Benjamin Black*, who is under the age of twenty-one years, comes and defends, &c.

The infant plaintiff, who ſues by *prochein amy*, is not liable to coſts, becauſe he cannot, while under age, diſavow the ſuit; but the *prochein amy* is liable, *Str.* 548. and if it appears to the court that he is not of ſufficient ability to pay the coſts, the court will order another who is. *Str.* 708.

Chap. XLVI.

Of entries to ſave the ſtatute of limitations. Of entries of ſatisfaction and the inrolment of deeds.

Of ſaving the ſtatute of limitation.

THE proceſs ſued out in order to avoid the ſtatute of limitations, muſt be carried to the ſheriff for a *non eſt inventus*, and then entered

on a roll as of the term in which it is returnable, thus,

Entry of a bill of Middleſex.

As yet of the term of the Holy Trinity, twenty-third George the third, one thouſand, ſeven hundred and eighty-three. Witneſs *William* earl Mansfield.

Middleſex to wit. The ſheriff is commanded to take *Benjamin Black* and *John Doe*, if they may be found in his bailiwick, and them ſafely keep, ſo that he may have their bodies before our lord the king, at Weſtminſter, on next after to anſwer *William White*, in a plea of treſpaſs, and that he then have there this precept. By bill, *Stormont* and *Way*.

Return.

At which day before our lord the king, at Weſtminſter, came the ſaid *William White* in his proper perſon, and offered himſelf againſt the ſaid *Benjamin Black*, in the plea aforeſaid; and the ſheriff, to wit, *Bernard Turner*, eſq. and *Thomas Skinner*, eſq. ſheriff of the ſaid county, returned that the ſaid *Benjamin Black* was not found in his bailiwick.

If the proceſs be a *latitat*, or attachment of priviledge it muſt be ſet forth on the roll, with the return in the ſame form. And the proceſs, when returned, taken to the ſigner of the writs, in order to be filed, and the roll carried to the clerk of the judgments to be entered and docquetted.

Docquet paper.

Entry of *A. B.* gentleman, one &c.

Middleſex to wit. Entry of a bill to ſave the ſtatute between *William White* plaintiff, and *Benjamin Black* defendant.

Returnable, &c. Roll.

If the proceſs be an *original* or *capias*, the entry thereof with the return, (ſuch proceſs when returned being filed with the filazer,) muſt be made out accordingly.

Upon the defendant's pleading the ſtatute in bar of the action, the plaintiff muſt ſhew that he has continued the writ to the time of the action brought and muſt ſhew that the firſt writ was returned. For if the defendant pleads "*non aſſumpſit infra ſex annos ante exhibitionem billæ*," and iſſue be taken thereon, the plaintiff cannot give the bill of Middleſex or *latitat* in evidence, for it may be either the commencement of the action, or only to proceſs to bring the defendant into court, and as proceſs may be ſued out before the cauſe of action accrues, Bull, *ni. pri.* 157. ſo that the plaintiff inſtead of tendering iſſue, ſhould reply a bill of Middleſex or *latitat*, &c. ſued out at ſuch a time, and ſhew the ſame returned, and then continue the ſame in his replication on the proceſs on which the party comes in, averring that the firſt proceſs was ſued out and returned with a view to exhibit his bill, or declare for the ſame identical cauſe of action, and that the ſame was ſued out within the time limitted by the ſtatute.

The continuances where the party is driven to ſhew the writ continued, may be entered on the roll at any time.

The king or any eccleſiaſtical perſon is not within ſtatute. 11 *Rep.* 74.

If the proceſs in a perſonal action be ſued out within the time limitted by the ſtatute, and a *non eſt inventus* returned by the ſheriff, and the writ entered on the roll and filed, although the party doth not declare within the time limitted by the ſtatute, the action ſhall be ſaid to be brought in due time. 2 *Vent.* 192, 190, 259.

If an action properly commenced in an inferior court within ſix years is removed by the defendant into the king's bench by *habeas corpus*, the ſtatute of limitations will be no bar to the plaintiff in the king's bench, although ſix years were elapſed after the cauſe of action accrued, and before the removal into

into the king's bench, *Bevin* v *Chapman*, *Mich.* 16. *Car.* 2. 1 *Sid.* 228. 1 *Lev.* 143. *Lord Raym.* 1427. That is, if the plaintiff replies the ſuit below and ſhew that to have been within the ſix years. 2 *Salk.* 424.

In *aſſumpſit* the defendant pleaded the ſtatute of limitations, and the plaintiff replied that the defendant was a parliament man, &c. plea over-ruled becauſe one may file an original againſt a parliament man, and continue it down without breach of privilege; here being no actual moleſtation of his perſon or eſtate, and this of abſolute neceſſity to ſave the bar of the ſtatute, for ſuch caſe not being provided for by an exception, the plaintiff would be barred of his action though he could not file an original. *Lev.* 111. *Mod.* 145. 2 *Salk.* 512. *Show.* 99. *Carth.* 137. *Lord Raym.* 1113.

Entry of ſatisfaction.

If ſatisfaction is made of a judgment, a warrant of attorney ſhould be given to the attorney by the plaintiff, (at the expence of the defendant,) to enter up ſatisfaction on record, which is made out on a piece of blank parchment in the ſhape of common a bail-piece.

Satisfaction-piece.

Term, in the 23d year of the reign of king *George* III. *Stormont* and *Way*.

Middleſex, to wit. Satisfaction is acknowledged between *William White*, plaintiff, and *Benjamin Black*, defendant, in a plea of debt (or as the caſe is) for 1000*l.* debt, and 63*s.* damages.

A. B. attorney.

Judgment *entered of Term*, 22 *Geo.* 3. *Roll.*

Th

This is taken to the clerk of the judgments, who will file the ſame, paying 3*s.* if in term, in vacation 1*s.* 8*d.* more, for the keys of the treaſury; if it is to be entered on the roll immediately, which ſeems needleſs, as the ſatisfaction-piece is filed.

Of inrolling deeds.

If the deed intended to be inrolled be a bargain and ſale, one of the parties muſt acknowledge his execution, either in court or before a judge at chambers; but if it require the judge's *fiat* only, the party need not attend.

The deed is left with a judge, who with his own hand delivers it in court to the ſecondary, and orders him to inrol it. In term it may be inrolled immediately, but in vacation muſt be left with the judge until the enſuing term.

When the deed is returned it is entered upon a roll in this manner:

As yet of the term of 23 *Geo.* 3.
Witneſs, *William*, earl Mansfield.
England, to wit. Be it remembered, That on the day of in this ſame term, before our lord the king at Weſtminſter, one of the juſtices of our lord the king, before the king himſelf, came into the court of our ſaid lord the king, before the king himſelf, and recorded, that on the day of (the day of the acknowledgment of the deed), one thouſand, ſeven hundred and eighty-three, at Serjean'ts Inn, in Chancery-lane, London, came *William White*, in his proper perſon, and brought before the ſame juſtice then there, a certain indenture, which he acknowledged to be his deed; and prayed that the ſame indenture might be inrolled of record in the ſaid court as his deed, which ſaid indenture the aforeſaid juſtice, by his own proper hands, hath now delivered into court here, to be inrolled, and it is inrolled in theſe words, to wit, This indenture (here is inſerted the deed *verbatim*, copying every word

word with the names of the parties, and making the following mark for ſeals, ✕ and the witneſſes names). When copied and examined, theſe words are to be indorſed upon the deed,

"Inrolled in the court of our lord the king, before the king himſelf, of term, in the twenty-third year of the reign of king George the Third."

Roll.

Then a docquet of the deed is to be made upon a ſlip of paper, in this form:

Docquet:

The entries of *A. B*, gentleman, one, &c. of the term of Twenty third George the Third, one thouſand, ſeven hundred and eighty-three.

Middleſex, to wit. Indenture of bargain and ſale, dated the day of one thouſand, ſeven hundred and eighty-three, and made between *William White*, of, &c. of the one part, and *Benjamin Black*, of the other part, of ten meſſuages and ten acres of land, with appurtenances, in the pariſh of *A.* in the ſaid county.

Roll.

Chap. XLVII.

Of Notices.

Notice to ſet aſide an interlocutory judgment.

TAKE notice that this honourable court will be moved to-morrow, or ſo ſoon after as counſel can be heard, that the interlocutory judgment ſigned in this cauſe, may be ſet aſide for irregularity with coſts, to be taxed by the maſter, and in the mean time all proceedings be ſtayed. Dated, &c.

T

Notice of motion to ſet aſide judgment and inquiry.

Take notice that this honourable court, will be moved on next or ſo ſoon after as counſel can be heard, that the interlocutory judgment ſigned in this cauſe, and the writ of inquiry executed thereon, may be ſet aſide for irregularity with coſts to be taxed by the maſter, and that in the mean time all proceedings be ſtayed, &c.

Notice of motion to ſet aſide a judgment and execution executed, and that the money paid, &c. be reſtored.

Take notice that this honourable court, will be moved on next or ſo ſoon after as counſel can be heard, that the judgment ſigned in this cauſe, and the execution iſſued and executed thereon, may be ſet aſide for irregularity, with coſts to be taxed by the maſter, and that the ſum of levied and paid in the hands of the ſheriff of *Middleſex*, may be reſtored to the above named defendant, and that the ſaid ſheriff retain the ſame in his hands, until the further order of this court, and that in the mean time all further proceedings be ſtayed. Dated, &c.

Notice of motion to be permitted to file common bail.

Take notice that this honourable court, will be moved on next or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why the defendant ſhould not be permitted to file common bail in this cauſe, and that in the mean time all proceedings be ſtayed. Dated, &c.

Notice of motion to ſet aſide all proceedings for irregularity.

Take notice that this honourable court will be moved on next, or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why all the proceedings in this cauſe, ſhould not be ſet aſide for irregularity, and that in the mean time all further proceedings be ſtayed. Dated, &c.

Notice of motioon to ſhew cauſe why it ſhould not be referred to the maſter to compute principal and intereſt upon a bond.

Take notice that this honourable court will be moved on next, or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why it ſhould not be referred to the maſter to compute the principal and intereſt due upon the bond in queſtion, and why upon payment thereof, together with the coſts to be taxed by him, the ſaid bond ſhould not be delivered up to the defendant to be cancelled. Dated, &c.

Notice of motion to ſhew cauſe why judgment ſhould not be ſet aſide, and the plaintiff anſwer the matter of an affidavit.

Take notice that this honourable court will be moved on next, or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why the judgment ſigned in this cauſe ſhould not be ſet aſide for irregularity with coſts, and why the plaintiff ſhould not anſwer the matters of the affidavit annexed, and that in the mean time all further proceedings be ſtayed. Dated, &c.

Notice of motion to ſhew cauſe why the aſſignment of the bail bond and the proceedings thereon ſhould not be ſet aſide.

That this honourable court will be moved on next, or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why the aſſignment of the bail-bond in this cauſe, and the proceedings thereon, ſhould not be ſet aſide, upon payment of coſts, to be taxed by the maſter, and in the mean time all the proceedings be ſtayed.

Notice of motion to ſhew cauſe why the writ ſhould not be quaſhed and the plaintiff anſwer the matter of the affidavit.

Take notice that this honourable court will be moved on next, or ſo ſoon after as counſel

ſel can be heard, that the plaintiff may ſhew cauſe why the writ of *latitat* iſſued in this cauſe ſhould not be quaſhed, and why the plaintiff ſhould not pay the coſts of this application, and that the plaintiff may anſwer the ſeveral matters mentioned in the affidavit,

Notice to the ſheriff to retain money.

Take notice that this honourable court will be moved on next, or ſo ſoon after as counſel can be heard, that the plaintiff may ſhew cauſe why the judgment in this cauſe and the execution executed thereon ſhould not be ſet aſide for irregularity; and why the money retained in your hands ſhould not be reſtored to the defendant, and that in the mean time you retain the ſame until the further order of the court.

To the ſheriff of the county of Middleſex, his bailiff and under ſheriff.

Chap. XLVIII.

Of Error.

A WRIT of error is a writ which iſſues out of the court of chancery, and lies for ſome miſtake, or ſuppoſed miſtake, whereby any one is aggrieved by the proceedings and judgment in any court of record, having power to hold plea of debt, or treſpaſs above forty ſhillings. It is alſo a commiſſion to the judges of a ſuperior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on ſuch examination to affirm or reverſe the ſame, according to law.

Any perſon damnified by error in a record, or that may be ſuppoſed to be injured by it, may bring a writ of error to reverſe it, whether he be party or no; but principal and bail cannot join in a writ of error. Nor can any perſon bring error to reverſe a judgment, who was not party or privy to the record, or who is not injured by the judgment, and therefore to receive

advantage from the reverſal thereof. *Roll. Abr.* 747. *Dyer.* 90.

If a plaintiff is nonſuit at *niſi prius*, he may bring error upon the judgment. *Roll. Abr.* 744.

In this court a writ of error lies, if the ſuit be by bill, in the exchequer chamber; if by original, in parliament: If the king is a party, though the ſuit be by bill, it muſt alſo be brought in parliament, ſo alſo upon a judgment on a *ſcire facias*. Saund. 346. Carth. 180. Stat. 47 Eliz. *c.* 8.

A writ of error is a writ of right in all caſes but felony and treaſon, *Salk.* 504. and may be had againſt the king.

Error lies either in the ſame court the judgment was given, or in a ſuperior court. In the ſame court where the judgment was given, when the error was not any fault in the court, but ſome defect in the proceſs, other than in the judgment, or the default of a continuance, *Dy.* 196 *a.* or for default in adjudging execution, 1 *Rol.* 176. 7 *Hen.* 6. 30. *Yelv.* 157. *F. N. B.* 21. I. as for miſpriſon of the clerk, or error in fact, and then the error may be in the ſame court, 1 *Sid.* 208. except where the error is in the exchequer. 3 *Lev.* 38.

But on error in law, or in the judgment of the court, the writ lies to a ſuperior court, and only lies on matter of law appearing upon the face of the proceedings, ſo that no evidence is required to ſupport it; for if there has been error in the determination of the facts in the cauſe, which was the province of the jury, the application for redreſs is not by writ of error, but was formerly by attaint of the jury, and now is to the juſtice of the court to grant a new trial, in order to correct the miſtakes of the former verdict.

Error lies from almoſt all inferior courts of record in England into the king's bench. Error does not lie from newly conſtituted courts whoſe proceedings are different from the courſe of the common law,—yet the court of king's bench may examine ſuch proceedings by *certiorari* or *mandamus*.

Of

Of Error from the king's bench into the exchequer chamber.

As no writ of error lay of a judgment in this court but in parliament, and as the ſubjects were often diſappointed of their writ of error, by the not ſitting of parliament, or by their being employed in public buſineſs during their ſitting. It is enacted, "That where judgment is given in the king's bench, in debt, in detinue, covenant, account, action upon the caſe, *ejectionæ firmæ*, or treſpaſs, firſt commenced there (except where the queen is party), the party, plaintiff or defendant, againſt whom ſuch judgment ſhall be given, may, at his election, ſue forth out of the chancery a writ of error, directed to the chief juſtice of the ſaid court, commanding him to cauſe the record, and all things concerning the ſaid judgment, to be brought before the juſtices of the common pleas, and barons of the exchequer into the exchequer chamber; there to be examined by the ſaid juſtices and barons, which ſaid juſtices of the common bench, and ſuch barons of the exchequer as are of the degree of the coif, or ſix of them at the leaſt, ſhall have power to reverſe or affirm the ſaid judgment, other than for error concerning the juriſdiction of the king's bench, or want of form, in any writ, return, plaint, declaration, or other proceeding. And after ſuch judgment is reverſed or affirmed, the ſaid record ſhall be remanded, that the king's bench may proceed thereupon, as ſhall appertain: yet ſuch reverſal, or affirmance, ſhall not be ſo final, but that the party who finds himſelf aggrieved, may ſtill ſue in parliament as before." 27 *Eliz. c.* 8.

This ſtatute only gives the party his option of bringing error in parliament, or in the exchequer chamber.

The exchequer chamber under this act hath nothing to do with errors in fact. 2 *Lev.* 38. 1 *Vent.* 67. 2 *Mod.* 194.

Error can only be returnable in the exchequer chamber in the caſes mentioned in this act, where the ſuit was commenced in *B. R.* If the ſuit is by original

original, a writ of error upon a judgment muſt be returnable in parliament, and cannot be in the exchequer chamber, becauſe ſuch ſuit is not commenced in *B. R.* but in chancery.

But if a plaintiff in *B. R.* be nonſuited, and there is a judgment againſt him for coſts, error lies in *cam. ſcacc.* Stra. 325.

After verdict, judgment ſhall not be ſtayed or reverſed, upon a writ of error, for any variance in form between the original, and declaration, or for want of an averment of the party's life, ſo as it be proved he or they be in life, or awarding any *venire*, *habeas corpora*, or *diſtringas* to a wrong office, upon any inſufficient ſuggeſtion, or by reaſon that the plaintiff in *ejectionæ firmæ*, or in any perſonal action being under age appeared by attorney, and the verdict paſſed for him, but this does not extend to actions on penal ſtatutes. 21 *Jac.* 1. *c.* 13.

In all actions real, perſonal, or mixt, the death of either party between verdict and judgment, ſhall not be alledged for error. 17 *Car.* 2. *c.* 8.

Judgment ſhall not be ſtayed or reverſed upon a writ of error, for any defect in form or ſubſtance, in any bill, writ, &c. or for variance in ſuch writs, from the declaration or other proceedings. 5 *Geo.* 1. *c.* 13.

Writ of error to be brought and proſecuted with effect within 20 years. 10 & 11 *W.* 3. *c.* 14.

Bail muſt be put in on an action on a ſingle bond for debt, or upon an obligation with condition for the payment of money, debt for rent, or upon any contract, and to be bound in double the ſum recovered, to proſecute the writ of error with effect, and pay the debt, damages, and coſts adjudged on the former judgment, and all coſts and damages to be awarded for delaying execution. 3 *Jac.* 1. *c.* 8.

No execution ſhall be ſtaid after verdict and judgment in any perſonal action whatſoever, unleſs a recognizance be entered into according to the 3 *Jac.* 1. *c.* 8. 16 *Car.* 2. *c.* 8. *ſ.* 3.

Wh

This does not extend to writs of error, brought by an executor or adminiſtrator, nor to any writ of error brought in any action popular, or penal, (except action of debt upon 2 *Ed.* 6. for not ſetting forth of tythes), nor to any indictment, &c. actions upon the caſe, &c. after judgment by default only, in which no bail is requiſite, nor is it requiſite, on a bond conditioned for performance of covenants, or on a bail bond.

Coſts are to be given upon writs of error, 8 & 9 *W.* 3. *c.* 11. 4 & 5 *Ann. c.* 16.

Every attorney who ſhall ſue out any writ of error on any judgment in this court, returnable in the exchequer chamber, ſhall forthwith allow ſuch writ of error with the clerk of the errors of this court, for the time being, and no execution ſhall be ſtayed untill ſuch allowance, and where ſpecial bail is required, if the plaintiff upon ſuch writ of error does not within four days after the allowance thereof put in ſpecial bail, the plaintiff in the action may proceed to take out execution, notwithſtanding ſuch writ of error. *Rule, Eaſt.* 36 *Car.* 2.

Recognizance of bail in error.

That the plaintiff ſhall proſecute his writ of error with effect; and if the judgment is affirmed, ſhall ſatisfy the debt, damages and coſts; together with ſuch coſts as ſhall be awarded by occaſion of the delay of execution; or elſe that the bail ſhall do it for him.

Bail by the leſſor of the plaintiff, after verdict and judgment in ejectment, may be given by himſelf only, and the plaintiff muſt enter into bail in dower himſelf only, 16 & 17 *Car.* 2. *c.* 8. *ſect.* 3. and the recognizance muſt be in double the value of one year's rent, in ejectment.

In order to ſue out a writ of error upon a judgment in the king's bench by bill, returnable in the exchequer chamber. A *præcipe* is to be made for the curſitor as follows:

Præcipe.

Præcipe.

Middleſex Writ of error for *Benjamin Black*, at the ſuit of *William White* on a judgment in caſe, given in the king's bench by bill, returnable.

C. D. attorney.

This *præcipe* is taken to the curſitor of the county, in which the *venue* is laid, who will make out the writ, paying, without a private ſeal, 1*l.* 1*s.* 6*d.* 8*s.* 6*d.* more if a private ſeal; when ſealed it is to be taken to the clerk of the errors, who will allow it, a copy of which allowance, muſt be ſerved on the attorney for the plaintiff in the original action, at the ſame ſhewing him the original, and from that time it is a *ſuperſedeas* of all proceedings in the original action; for the plaintiff's attorney cannot be in contempt until he is ſerved with the allowance. This allowance ſhould be ſerved at the time of taxing the coſts, and ſigning final judgment, but if ſerved before, which is often done, yet it operates as a *ſuperſedeas*, although he ſtays till after the return before he ſigns final judgment, as the judgment has reference to the firſt day of the term, allowance 2*l.* 0*s.* 6*d.*

When bail is required, the names of the bail and their additions, are given to the clerk of the errors, who will enter them in his book; and he takes their recognizance at the judge's houſe, or chambers, or in court, paying at chambers 1*l.* 5*s.* 6*d.* at Weſtminſter, 6*s.* 8*d.* more.

Notice of bail.

In error. *Benjamin Black* againſt *William White.*

Take notice that ſpecial bail was this day put in upon the writ of error brought in this cauſe, with the clerk of the errors, before the honourable Mr. Juſtice , at his chambers in Serjeants-inn, Chancery-lane, London, and their names are *Rich-*

ard

ard Red of &c. gentleman, and *George Green* of &c. gentleman. Dated &c. Your's &c.

C. D. attorney for the plaintiff in error.

To Mr. *A. B.* attorney
for the defendant.

If the defendant in error, (the original plaintiff) excepts againſt them, it muſt be done within twenty days next after the bail is put in, which exception is to be entered in the clerk of the error's book, and notice given to the plaintiff in error's attorney. *Rule M. 5 W. & M.*

If the plaintiff in error juſtifies, he gives two days notice, excluſive of the day notice is given, for that purpoſe; and beſpeaks the book to go to Weſtminſter; makes affidavit of the ſervice, and gives counſel a brief to move to juſtify, fee, 10*s.* 6*d.* clerk of the errors, 10*s.* officer of the court, 9*s.* 6*d.*

The bail being compleat, the defendant in error's attorney is to ſearch when the writ of error is returnable, and if no bail is required, this ſtep is the firſt that defendant's attorney in error takes; if it is returnable the ſame term the allowance is made on; he then proceeds by giving a rule for the plaintiff in error to tranſcribe, which rule expires in eight days after ſervice; rule 2*s.* a copy of which is to be ſerved on the plaintiff in error's attorney.

A copy of all the proceedings is then to be left with the clerk of the errors, who makes the tranſcript therefrom, and the bill is filed the ſame term the declaration is of with the clerk of the declarations.

The clerk of the errors will, upon the proceedings being left, ſend to the plaintiff in error's attorney for a guinea in part, or if not, upon receipt of the rule to tranſcribe he is to leave him one; if the plaintiff in error's attorney does not tranſcribe the record, the ſame term the error is returnable of, the defendant in error's attorney may; but if he does, the defendant's attorney will next term go to the treaſury, and examine the tranſcript with the roll, paying according to the length, which the clerk of the errors will ſend

for; if its not examined in term, the keys of the treasury must be paid for.

The record itself is not returned from the king's bench into the exchequer chamber, but only a transcript thereof, and all the rules until the making and delivering over the transcript are given by the clerk of the errors in *B. R.* but afterwards by the clerk of the errors in the exchequer chamber,

After the transcript is examined and compleat, the clerk of the errors in *B. R.* delivers over the same to the clerk of the errors in the exchequer chamber. In this term which is the second, the defendant in error's attorney applies to the clerk of the errors in *cam. scac.* for a rule to alledge diminution, which is to be done in eight days after service, or a nonsuit must be entered. Therefore the plaintiff's attorney in error must pay the money as marked upon the rule, 8*s.* for alledging diminution, and 1*s.* 4*d. per* folio for the transcript, if not, the clerk of the errors in *cam. scacc.* will sign a *non pros.* himself, and tax the costs. But if he does, then the defendant in error's attorney must the next term get a rule to assign errors, Rule 25. a copy is to be served on the plaintiff in error's attorney, and he must assign errors in eight days next after service. The plaintiff's attorney draws an assignment of errors, paying counsel signing 10*s.* 6*d.* which is ingrossed on a treble penny stamp paper, and filed with the clerk of the errors on *cam. scacc.* paying 8*s.* for filing.

The next term being the fourth, the defendant in error, (if general errors are assigned) may join in error immediately, which is done at the office of the clerk of the errors in *cam. scacc.* who when this is done moves for a *concilium*, sets down the cause, and moves for judgment himself; and afterwards taxes the costs, which he will give the defendant in error's attorney on paper, who may then sue out execution.

If the plaintiff designs to have the errors set down (that is where real errors are assigned and meant to be argued) ten days notice is to be given to the clerk of the errors for that purpose, and the plaintiff then is to deliver four paper books to the judges of the common pleas; and the defendant four to the baron

four days before the day of argument. *Rule, Eaſt.* 33 *Car.* 2.

In this caſe a *concilium* muſt be moved for in form, and the clerk of the errors in *cam. ſcacc.* ſets the errors down for argument. If the plaintiff in error does not ſet them down, the defendant may; briefs in this caſe are to be given to counſel, containing a copy of the whole proceedings from the tranſcript; if the judgment is affirmed, the coſts are taxed by the clerk of the errors in *cam. ſcacc.* and then the original plaintiff may ſue out execution.

Aſſignment of error in the exchequer chamber.

Afterwards to wit, on next after in this ſame term, comes the ſaid *Benjamin Black*, by *C. D.* his attorney, and ſays that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this, to wit, that the declaration aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *William White*, to have and maintain his aforeſaid action thereof, againſt *Benjamin Black*. There is alſo error in this, to wit, that by the record aforeſaid, it appears, that the judgment aforeſaid, in form aforeſaid given, was given for the ſaid *William White*, againſt the ſaid *Benjamin Black*. Whereas, by the law of the land, the ſaid judgment ought to have been given for the ſaid *Benjamin Black*, againſt the ſaid *William White*. And the ſaid *Benjamin Black*, prays that the judgment aforeſaid, for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing, and that he may be reſtored to all things, which he hath loſt by occaſion of the ſaid judgment, &c.

Upon a ſpecial verdict the judgment in *B. R.* was for the defendant, which was reverſed in the exchequer chamber. Beſides the reverſal, the court gives a compleat judgment for the plaintiff, *viz.* that he do recover. *Carth.* 319. *Ld. Raym.* 10.

In treſpaſs three hundred pounds damages were recovered, and error was brought on the judgment in *cam. ſcacc.* pending, which, the plaintiff brought an action of debt upon the judgment, and by all the judges, except *Keelynge*, it well lies, for the record itſelf is yet in court, and the writ of error is a *ſuperſedeas* only. 1 *Lev.* 153.

Error from the common pleas into the king's bench.

The court of king's bench, hath power to correct errors in the court of common pleas, and the record itſelf muſt be removed there, that it may remain as a precedent and evidence of the law in like caſes. *Roll. Abr.* 573. 5 *Co.* 39.

If a judgment be given in the common pleas, and the defendant brings error, a *præcipe* is to be made for the curſitor in this form:

Præcipe for a writ of error on a judgment in C. B.

Middleſex. Writ of error for *Benjamin Black* againſt *William White* in caſe, on a judgment in the common pleas returnable ——, whereſoever, &c.

C. D. Attorney.

This *præcipe* is taken to the curſitor's office of the proper county, who will make out the writ, paying 1*l.* 1*s.* 6*d.* if a private ſeal 8*s* 6*d.* more.

The writ is then taken to the clerk of the errors, in *C. B.* paying him for the allowance 2*l.* 2*s.* 6*d.* a copy of the allowance is to be ſerved on the plaintiff's attorney, in the original action.

If bail is required, the plaintiff in error's attorney muſt put in the ſame, before one of the juſtices of the common pleas, within four days next after the filing the writ of error with the clerk of the errors, or an execution may iſſue.

The names and addreſs of the bail are to be given to the clerk of the errors, who will take the recognizances at one of the judge's chambers, paying him 1*l.* 4*s.* if at Weſtminſter, 6*s.* 8*d.* more; and notice thereof

thereof is to be given to the defendant in error's attorney, who may, if he thinks proper, except againſt them, by entering the exception in the book of the clerk of the errors, within twenty days next after bail is put in; and applying to the clerk of the errors, for a rule for better bail, rule 45. copy of which is to be ſerved on the plaintiff in error's attorney, this rule expires in four days.

If it is intended, that the bail ſhould juſtify, then the plaintiff in error's attorney will give notice thereof, two days excluſive of the day of juſtifying.

Notice of juſtifying bail.

In the common pleas.
In error.

Benjamin Black, plaintiff
and
William White, defendant.

Take notice that the bail already put in for the plaintiff in this cauſe on the writ of error, and of whom you have had notice, will, on the day of next, juſtify themſelves in this honourable court at Weſtminſter-hall in the county of Middleſex, as good and ſufficient bail for the ſaid plaintiff. Dated this day of 1783.

Your's, &c.
C. D. attorney for plaintiff in error.

To Mr. *A. B.* attorney
for the defendant in error.

The day before the plaintiff in error intends juſtifying, he muſt give notice to the clerk of the errors, to attend with the bail book, making affidavit of the ſervice of the notice, and give it to a ſerjeant to move to juſtify the bail, *fee* 10*s.* 6*d.* juſtification and court fees 15*s.* in the evening the rule for the allowance is to be drawn up at the ſecondaries, paying 5*s.* and a copy ſerved on the defendant in error's attorney.

If bail is not required, as for inſtance, on judgment by default in caſe, treſpaſs, and the like, the defendant in error upon the return of the writ gets a

rule

rule to tranſcribe, (and the ſame is done by him, after bail perfected, as the next ſtep) the rule is had of the clerk of the errors in *C. B.* paying 4*s.* and a copy is to be ſerved on the plaintiff in error's attorney.

The plaintiff in error's attorney before this rule expires, which is in eight days next after the ſervice, uſually pay one guinea in part of the tranſcript to the clerk of the errors, and before it is compleat the clerk of the errors will ſend for more.

If there be no original filed and the vacation of the term in which judgment is ſigned is elapſed, the defendant in error's attorney muſt, before he takes out a rule to tranſcribe, petition the maſter of the rolls for an original; therefore if a writ of error of is expected the plaintiff ſhould get the original allowed by the prothonotary, in the taxing of the coſts, and make a *præcipe* for the original forthwith; which is to be taken to the curſitor to make out the original, for in caſe this is neglected, the maſter of the rolls will not order the original to be made out, "but upon payment of coſts to the plaintiff in error, in caſe he does not further proſecute the writ."

Petition to the maſter of the rolls.

In the common pleas.
Between *William White*, plaintiff,
and
Benjamin Black, defendant.

The humble petition of the ſaid *William White*, the plaintiff,

Humbly ſheweth,

That your petitioner in term, one thouſand, ſeven hundred and eighty-two, commenced an action at law againſt the above-named *Benjamin Black*, late of Weſtminſter, in the county of Middleſex, gentleman, in his majeſty's court of common pleas at Weſtminſter, in a plea of treſpaſs on the caſe, to his damage of fifty pounds, and your petitioner hath laid his *venue* in the county of Middleſex; and judgment hath been obtained in ſuch action in term laſt paſt, for thirty pounds damages, and fifteen pounds

pounds coſts, whereupon the ſaid defendant hath brought his writ of error, returnable to his majeſty's court of king's bench, on whereſoever, &c. but no further proceedings have been had thereon.

That your petitioner hath not as yet ſued out any original writ to warrant the ſaid judgment, and that he is adviſed it is neceſſary that the ſame ſhould be ſued out to warrant the ſaid judgment, and the time for applying for the ſame in the ordinary courſe is expired, and that the curſitor of the ſaid county cannot make out the ſame without an order from your honor.

"Your petitioner therefore humbly prays your honor, to grant unto him an order that the curſitor of the ſaid county of Middleſex may iſſue an original writ in this cauſe, out of this honourable court, returnable to his ſaid majeſty's court of common pleas.

And your petitioner ſhall ever pray, &c."

Secretary to the maſter of the rolls, for order 5*s.* 6*d.*

A copy of the petition and order muſt be ſerved on, and after ſervice a tender of the coſts in error, made to the plaintiff in error's attorney, which if he accepts the original plaintiff may *nonpros* and take out execution; but if he elects to proceed, no coſts are allowed, and the order is taken to the curſitor, with a *præcipe* who will make out the original, which may be returned in this manner, though its uſual to leave it with the ſheriff of the county where the *venue* is laid.

Return of the original in caſe.

John Doe
Pledges to proſecute and
Richard Roe.

"The within named *C. D.* has not any thing in my bailiwick, whereby he can be attached, (if the action be debt, "ſummoned.") The anſwer of

" eſq.
and } Sheriff.
" eſq.

When

When the original is ſealed, and the return filed, it is taken to the *cuſtos brevium* of the common pleas, and filed, paying 4*d.* filing, and 4*d.* every poſt-term after the return.

After ſervice of the rule to tranſcribe, a copy of the proceedings muſt be left with the clerk of the errors and of the judgment (of courſe the roll is to be docqueted and carried in). If the writ of error be returnable the firſt return of the term, the clerk of the errors does not bring in the roll until the laſt day of that term.

If it be returnable on any other return of the term, the clerk of the errors does not bring in the roll until the firſt day of the ſubſequent term.

When the tranſcript is compleat, the defendant's attorney attends on the clerk of the errors, who will go with him to Weſtminſter, and examine the ſame, after its examined, the record is brought in and filed in the office of the chief clerk in *B. R.* with the writ of error annexed. And the parties take copies upon paying 4*d. per* ſheet, but it is incumbent on the attorney for the defendant to take it forthwith, as it will be wanted in the future ſtage of the cauſe.

The cauſe is then in the court of king's bench, and the defendant in error's attorney will proceed by a *ſcire facias quare executionem non*, to ſhew cauſe why execution ſhould "not be adjudged to the plaintiff," which is made returnable not on a day certain, but on a general return whereſoever the king ſhall then be, and teſted if the tranſcript be compleated the laſt day of term, on that day, returnable the firſt day of the next term, if its compleat in vacation, and not delivered over till the firſt day of the next term, then it is to bear *teſte* that day, and there muſt be fifteen days between the *teſte* and return.

The writ of *ſcire facias* is to be ſigned by the ſigner of the writs, ſigning 1*s.* 8*d.* ſealing 7*d.* and if left for a *nihil*, 1*s.* to the ſheriff, if left for a *ſcire feci*, then is a ſummons thereon from the ſheriff, paying 2*s.* 4*d.* officer 5*s.*

If there are two *ſcire facias's*, the laſt need not lie four days in the office before the return, nor for a *ſcire feci*, 3 Burr. 1723.

On the return day of the *ſcire facias*, if the defendant is warned, or upon a *nihil* returned on the *alias*, the defendant in error muſt give a rule thereon at the clerk of the rules, in this manner:

" In error, *Benjamin Black* againſt *William White*, rule on *ſcire facias*.

A. B. attorney."

Rule 1*s.* 10*d.* which expires in four days, excluſive of the day given, upon which day, if there is no aſſignment of errors left with the defendant in error's attorney, he may take out execution, but cannot *nonpros* the error, till after the rule is given for ſuch aſſignment, 4 *Burr.* 1972. but moſtly, the plaintiff will aſſign errors, which are uſually the common errors, as attended with leaſt expence, but he may aſſign the want of an original.

If the plaintiff in error does not aſſign errors, the defendant in error muſt, in order to get his coſts in error, proceed by getting a rule from the maſter of the king's bench office to aſſign errors, who will give the ſame on the draft of the *ſcire facias*, which rule is to be taken and entered with the clerk of the rules, paying 1*s.* 10*d.* and a copy ſerved on the plaintiff in error's attorney, and if he does not deliver an aſſignment of errors within the time mentioned in the rule, the defendant in error may then ſign a *nonpros* for want thereof, which is entered upon a double half-crown ſtamp paper, and on a roll, of the term the tranſcript is filed, the *ſcire facias* muſt follow the tranſcript, therefore there muſt be a poſt docket, beginning with the tranſcript; the clerk of the judgments in the king's bench office ſigns the ſame, paying according to the length of the pleadings, and the maſter taxes the coſts by a bill.

If the plaintiff in error aſſigns errors, ſuch aſſignment muſt if ſpecial be ſigned by counſel, and indorſed on a treble penny ſtamp.

If the errors assigned is the want of an original, then a rule must be obtained from the master, "to return a writ of *certiorari*," which writ must be issued by the plaintiff's attorney, and signed by the signer of writs, paying 1*s.* 8*d.* signing, sealing 7*d.* and is to be left with the *custos brevium* of the common pleas, who will certify whether such original is filed or not. If the defendant's attorney in error has not filed it, (although this is returned) he may file his original and make out a *certiorari* himself, and upon that the *custos brevium* will also return the original in the cause, which is to be filed by him at the office of the clerk of the errors in *B. R.* or in the treasury if in term time.

But if the real original is returned and filed, then the defendant in error gets a copy thereof on treble 6*d.* and joins in error by pleading in *nullo est erratum*, and enters a *non misit breve* on record, without taking any notice of the *diminution*; and the assignment of error is void.

If error be assigned in the original, and an erroneous original is returned upon a *certiorari*, and upon this *in nullo est erratum* is pleaded, and after the court *ad informandam conscientiam*, grant another *certiorari* for another original, and upon this a good original is certified, the court ought to intend, though this is the original on which the judgment was given, as judgments ought to be intended to be good. *Cro. Car.* 91. *Style* 176. 2 *Rol. Rep.* 363. *Godb.* 407.

An original of the term in which final judgment was given, will not warrant that judgment, if it appears upon the same record that there have been proceedings of a subsequent term. But the plaintiff below ought to have an original of the term the *placita* is of. *Dyke v. Sweeting*, 1 *Wils.* 181.

If the errors assigned are special, the joinder in error must be signed by counsel, and ingrossed on treble penny stamped paper, and then delivered over to the plaintiff in error's attorney; but if general the defendant's attorney may join in error directly and deliver the common joinder in *nullo est erratum* on a treble penny stamp, to the plaintiff in error's attorney.

attorney, paying him 2s. 4d. for entering the same on record.

Joinder in error.

Stomont and *Way.*

term, twenty-third George the Third.

William White, against *Benjamin Black*. } There is not any error. *A. B.* attorney for the defendant in error.

After the joinder in error either party may move the court for a *concilium*, counsel 10s. 6d. the rule for which must be drawn up at the clerk of the rules, and the proceedings entered on the roll, as of the term the transcript was filed, the clerk of the treasury will mark the same, and enter the cause for argument, as on demurrer, a copy of the rule must be served on the opposite attorney, the roll docquetted at the king's bench office, and filed in the treasury at Westminster.

The whole proceedings are entered on the roll, beginning with the writ of error, to the end of the transcript, assignment of errors, to the end of the joinder; copies are then made of the paper book which contain the whole proceedings as on the roll, the plaintiff is to deliver two copies to the chief justice and senior judge, the defendant two other copies to the other judges, *R. M.* 17 *Car.* 2. paying each clerk 2s. By the rule of Easter, 2 *Jac.* 2. the paper books should be delivered four days before argument, but two are now held sufficient. If the plaintiff's attorney neglects to deliver the books on his part, the defendant may, then judgment will be given of course against the plaintiff; the defendant draws up the rule for judgment at the clerk of the rules, and stamps it with a double half-crown stamp, and the master will tax the costs thereon, without a bill, but must have the roll to mark, which the clerk of the treasury is to bring to the master.

If the plaintiff in error does not assign the want of an original, &c. or pray a *certiorari*, and the general assignment "that the judgment is given for the plain-

tiff, whereas it ought to have been given for defendant" is made, in that case the defendant in error, may join the next term in error, and move for a *consilium* as before, without a rule to return the *certiorari*.

Scire facias *quare executionem non.*

George, &c. To the sheriff of Middlesex, greeting: Whereas *William White*, lately in our court before *Alexander* lord Loughborough and his companions, our justices of the bench at Westminster, by our writ, and by the judgment of the same court, recovered against *Benjamin Black* late of Westminster, in your county, gentleman, fifty pounds for his damages, which he sustained by occasion of the not performing certain promises and undertakings lately made by the said *Benjamin* to the said *William* at Westminster in your county, as for his costs and charges by him about his suit in that behalf laid out, whereof the said *Benjamin* is convicted, as by the record and proceedings thereof, which for certain causes, we lately caused to be brought into our court before us, manifestly appears, and now on the behalf of the said *William* we have been informed in our same court before us, that although judgment be thereon given, yet execution of the damages aforesaid still remains to be made to him the said *William*, whereupon the said *William* hath humbly besought us, that we should provide him a proper remedy in this behalf, and we being willing that what is just and right should be done in this particular, command you, that by good and lawful men of your bailiwick, you make known to the said *Benjamin* that he be before us on wheresoever we shall then be in England, to shew if he has or knows of any thing to say for himself, why the said *William* ought not to have his execution against him the said *Benjamin* for the damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what in our said court before us

us ſhall then and there be conſidered of him in this behalf, and have you there then the names of thoſe by whom you ſhall cauſe it to be known to him, and this writ. Witneſs *William* earl Mansfield at Weſtminſter the day of in the twenty-third year of our reign.

Stormont and *Way*.

Præcipe.

Middleſex. *Scire facias* in error between *William White* plaintiff, and *Benjamin Black*, defendant, returnable on wheresoever, &c.

A. B. attorney.

To be ſigned by the ſigner of the writs; ſigning 1*s*. 8*d*. ſealing 7*d*.

Aſſignment of errors, that there is no original writ filed of record.

Stormont and *Way*.

term, in the twenty-third year of the reign of king George the third.

Benjamin Black, against *William White*. } Afterwards, that is to ſay, on in this ſame term, before our lord the king at Weſtminſter comes the ſaid *Benjamin* by *C. D.* his attorney, and ſays, that in the record and proceedings aforeſaid, and alſo in the giving of the judgment aforeſaid, there is manifeſt error in this, to wit, that the declaration aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *William* to have or maintain his aforeſaid action thereof againſt the ſaid *Benjamin*; there is alſo error in this, to wit, that by the record aforeſaid it appears, that the ſaid *Benjamin* was attached to anſwer to the ſaid *William* in the plea aforeſaid, yet no original writ between the parties aforeſaid, in the plea aforeſaid, is filed of record, nor remains of record in the ſaid court of the ſaid lord the king of the bench, at

at Weſtminſter aforeſaid; therefore in that there is manifeſt error; there is alſo error in this, that it appears by the record aforeſaid, that the judgment aforeſaid, in form aforeſaid given, was given for the ſaid *William* againſt the ſaid *Benjamin*, whereas by the law of the land, the ſaid judgment ought to have been given for the ſaid *Benjamin* againſt the ſaid *William*; and the ſaid *Benjamin* prays the writ of our ſaid lord the king to be directed to the *cuſtos brevium* of the ſaid court of the bench at Weſtminſter, to certify to the ſaid lord the king the truth of the ſame, and it is granted to him, &c. and the ſaid *Benjamin* prays that the judgment aforeſaid, for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing; and that he may be reſtored to all things which he hath loſt by occaſion of the ſaid judgment, &c.

If the want of warrants of attorney is aſſigned for error, then is ſaid, "there is alſo error in this, to wit, that there is no warrant of attorney filed of record, nor remains of record in the court of our lord the king of the bench at Weſtminſter, between the parties of the plea aforeſaid, to warrant the ſaid *A. B.* to be attorney for the ſaid *William White* againſt the ſaid *Benjamin* in the plea aforeſaid, therefore in this there is manifeſt error."

Certiorari *to certify the record of an original.*

George the Third, &c. To our right truſty and well beloved holding the office of keeper of the writs, rolls and records of our court of the bench, greeting: We being willing for certain cauſes to be certified, whether any original writ between *William White* and *Benjamin Black*, late of Weſtminſter, in the county of Middleſex, gentleman, in a plea of treſpaſs on the caſe, be filed in your cuſtody or not, do command you, that you ſearch our original writs, directed to our ſheriff of Middleſex and which are filed of record in your cuſtody of term, (the term the original is returnable) in the twent

wenty-third year of our reign, and what you ſhall find therein of an original writ iſſued between the parties aforeſaid, of the plea aforeſaid, you certify to us without delay, on whereſoever we ſhall then be in England, together with the return and indorſement thereon, as fully as the ſame remains in your cuſtody, and this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way.*

Præcipe.

Middleſex. *Certiorari* to certify the record of an original between *William White*, plaintiff, and *Benjamin Black*, defendant: returnable, &c.

Aſſignment of general error.

Benjamin Black, against *William White*. } term in the twenty-third year of king George the Third.

Stormont and *Way.*

Afterwards, to wit, on next after in this ſame term, comes the ſaid *Benjamin*, by *C. D.* his attorney, and ſays, that in the record and proceedings aforeſaid, there is manifeſt error in this, to wit, that the declaration aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *William* to have or maintain his aforeſaid action thereof againſt him the ſaid *Benjamin*, there is alſo error in this, to wit, that by the record aforeſaid, it appears, that the judgment aforeſaid, in form aforeſaid given, was given for the the ſaid *William* againſt the ſaid *Benjamin*, whereas by the law of the land, the ſaid judgment ought to have been given for the ſaid *Benjamin* againſt the ſaid *William*, and the ſaid *Benjamin* prays that the judgment aforeſaid, for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and

and altogether held for nothing, and that he may be reſtored to all things which he hath loſt by occaſion of the ſaid judgment, &c.

Joinder.

And hereupon afterwards, to wit, on next after in the year of the reign of our ſaid lord the king, the ſaid *William*, by his ſaid attorney, freely comes here into court, and ſays, that there is no error either in the record and proceedings aforeſaid, or in giving the judgment aforeſaid; and he prays that the ſaid court of our ſaid lord the king now here, may proceed to examine, as well the record and proceedings aforeſaid, as the matters aforeſaid above for error aſſigned, and that the judgment aforeſaid, in form aforeſaid given, may be in all things affirmed: but becauſe the court of the ſaid lord the king now here, is not yet adviſed what judgment to give of and concerning the premiſes; a day is therefore given to the parties aforeſaid to come before the ſaid lord the king on wheresoever, &c. to hear the judgment aforeſaid, for that the court of the ſaid lord the king now here, is not yet adviſed thereof, &c.

Joinder in error, where the want of an original is aſſigned.

Which ſaid writ of *certiorari* ſo prayed and granted, follows in theſe words, to wit: George, &c. (here is ſet forth the writ of *certiorari*) which ſaid chief juſtice of the bench aforeſaid, returned and certified unto our ſaid lord the king, that, by virtue of the ſaid writ, he had ſearched the records, and other remembrance rolls of the warrants of attorney for the ſaid county of Middleſex in his cuſtody, filed of record of term, in the year of the reign of our ſaid lord the king, and that there is an original writ iſſued againſt the ſaid *Benjamin*, at the ſuit of the ſaid *William*, in the plea aforeſaid, in his cuſtody filed of record, which ſaid writ he the ſaid chief juſtice thereby certified to the ſaid lord the king a

as appeared by the ſchedule thereunto annexed, which ſaid ſchedule ſo annexed to the ſaid writ of *certiorari*, follows in theſe words, to wit, (here is ſet forth the ſchedule *verbatim*) which ſaid writ of *certiorari*, together with the return thereof, among the records of term aforeſaid is filed, and hereupon afterwards, to wit, on next after in the year of the reign of the ſaid lord the king, the ſaid *William*, by his attorney aforeſaid, freely comes here into court, and ſays, that there is no error either in the record and proceedings aforeſaid, or in giving the judgment aforeſaid; and he prays that the court of the ſaid lord the king, now here, may proceed to examine, as well the record and proceedings aforeſaid, as the matters aforeſaid for error aſſigned, and that the judgment aforeſaid, in form aforeſaid given, may be in all things affirmed; but becauſe the court of the ſaid lord the king, now here, is not yet adviſed what judgment to give of and upon the premiſes, a day is given therefore to the parties aforeſaid, to come before the ſaid lord the king on wherſoever he ſhall then be in England, to hear the judgment aforeſaid, for that the ſaid court of our ſaid lord the king now here, is not yet adviſed thereof, &c.

Affirmance of judgment.

At which day, before our lord the king at Weſtminſter, came the parties aforeſaid by their attornies aforeſaid: Whereupon, as well the record and proceedings aforeſaid, and the judgment given in form aforeſaid, as the matters aforeſaid by the ſaid *Benjamin* above for error aſſigned, being ſeen and fully underſtood by the court of our ſaid lord the king now here, and mature deliberation had thereupon; for that it appears to the court of our ſaid lord the king now here, that there is no error either in the record and proceedings aforeſaid, or in the giving of the judgment aforeſaid: Therefore it is conſidered, that the judgment aforeſaid, given in form aforeſaid, be in all things affirmed. And it is further conſidered, that the ſaid *William* recover againſt the ſaid *Benjamin* his damages aforeſaid,

and alſo pounds, adjudged to him by the court of our lord the king now here, according to form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges which he has ſuſtained, by occaſion of the delay of the execution of the judgment aforeſaid, by means of the proſecuting the ſaid writ of error, which ſaid damages, coſts and charges, in the whole, amount to and that he have execution thereof, &c.

The entry of a nonpros *after* ſcire facias quare executionem non *in error, for want of aſſigning error.*

Afterwards, to wit, on next after in this ſame term before our lord the king at Weſtminſter, comes the ſaid *William*, by his attorney aforeſaid, and ſays, that execution of the judgment aforeſaid, ſtill remains to be made unto him: Therefore he prays the writ of our lord the king to be directed to the ſheriff of the county of Middleſex aforeſaid, that he make known to the ſaid *Benjamin* to be before the ſaid lord the king wheresoever &c. to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *William* ought not to have execution of his damages, coſts, and charges, aforeſaid, according to the form and effect of the judgment aforeſaid, and it is granted to him, &c. by which it is commanded, to the ſheriff aforeſaid, that by good and lawful men of his bailiwick, he make known to the ſaid *Benjamin*, that he be before the lord the king (on the return of the *ſcire facias quare*, &c.) wheresoever, &c. to ſhew in form aforeſaid, if, &c. and further, &c. the ſame day is given to the ſaid *William*, &c. at which day the ſaid *William*, by his attorney aforeſaid, comes before our lord the king, at Weſtminſter, and offers himſelf againſt the ſaid *Benjamin*, in the plea aforeſaid, and the ſheriff (to wit) *B. T.* eſq. and *T. S.* eſq. ſheriff of the ſaid county of Middleſex, returned that by virtue of the ſaid writ to him directed, by *Richard Red* and *George Green*, good, &c. he has given notice to the ſaid *Benjamin*, to appear, &c. to ſhew as by that writ he

he was required; and the ſaid *Benjamin*, being ſolemnly called, doth not come, but makes default; and hereupon the ſaid *William* ſays, that the ſaid *Benjamin* hath aſſigned no error or errors in the record in the proceedings aforeſaid, or in giving the judgment aforeſaid; therefore a day is given to the parties aforeſaid, to come before our lord the king, on next after , that is to ſay, for the ſaid *Benjamin* to aſſign error or errors in the record and proceedings aforeſaid, or in giving the judgment aforeſaid. At which day, before our lord the king at Weſtminſter, comes the ſaid *William*, by his attorney aforeſaid, and the ſaid *Benjamin*, being ſolemnly called, doth not come, but again makes default, nor hath he farther proſecuted the ſaid writ of error againſt the ſaid *William*. Therefore it is conſidered, that the ſaid *William* recover againſt the ſaid *Benjamin*, as well his damages aforeſaid, as alſo pounds, adjudged to him by the court of our lord the king now here, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges, which he has ſuſtained by occaſion of the delay of execution of the judgment aforeſaid, by means of the proſecution of the ſaid writ of error; which damages, in the whole, amount unto and that the ſaid *William* have execution thereof, &c, and the ſaid *Benjamin* in mercy, &c.

A capias ad ſatisfaciendum *on a judgment of the king's bench affirmed in the exchequer chamber.*

George the Third, &c. to the ſheriff of Middleſex, greeting: We command you, that you take *Benjamin Black*, if he ſhall be found in your bailiwick, and him ſafely keep, ſo that you may have his body before us at Weſtminſter, on next after to ſatisfy *William White* fifty pounds, for his damages which he hath ſuſtained, as well by reaſon of the not performing certain promiſes and undertakings, made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record;

and alſo pounds lately adjudged to the ſaid *William* in our court of exchequer chamber, by our juſtices of our common bench, and our barons of our exchequer of the degree of the coif, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges, which he had ſuſtained by reaſon of the delay of the execution of the judgment aforeſaid, on pretext of proſecuting our writ for correcting error brought in the premiſes by the ſaid *Benjamin* againſt the ſaid *William*, the ſaid judgment being there in all things affirmed, of which the ſaid *Benjamin* is alſo convicted: as by the record and proceedings of our ſaid juſtices and barons by them had in the premiſes, and by them remitted to, and remaining in our ſaid court before us at Weſtminſter, alſo appears to us of record. And have you there then this writ. Witneſs, &c.

Stormont and *Way*.

A fieri facias *on a judgment of the king's bench affirmed in the exchequer chamber.*

George the Third, &c. to the ſheriff of Middleſex, greeting: We command you, that of the goods and chattels of *Benjamin Black*, in your bailiwick, you cauſe to be made fifty pounds, which *William White*, lately in our court before us at Weſtminſter, by bill without our writ, and by judgment of the ſame court, recovered againſt the ſaid *Benjamin*, for his damages which he had ſuſtained, as well by reaſon of his not performing certain promiſes and undertakings made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and damages by him about his ſuit in that behalf expended, whereof the ſaid *Benjamin* is convicted, as appears to us of record; and alſo pounds, lately adjudged to the ſaid *William* in our court of exchequer chamber, by our juſtices of the bench, and our barons of our exchequer of the degree of the coif, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges, which he had ſuſtained, by reaſon of the delay of the execution of the

the judgment aforesaid, on pretence of prosecuting our writ for correcting error, brought in the premises by the said *Benjamin* against the said *William*, the said judgment being in all things affirmed, of which the said *Benjamin* is also convicted, as by the record and proceedings of our said justices and barons, by them had in the premises, and by them remitted to, and remaining in our said court before us at Westminster, also appears to us of record. And have you that money before us at Westminster, on next after to render to the said *William* for his damages aforesaid. And have there then this writ. Witness, &c.

Stormont and *Way*.

On a *nonpros* for not assigning errors, at the end of the first recovery, "And also pounds, adjudged to the said *William* in our said court of exchequer chamber, by our justices of our court of common bench, and our barons of our exchequer, of the degree of the coif, according to the form of the statute in such case made and provided, for his damages, costs and charges, which he hath sustained, by reason of the delay of the execution of the judgment aforesaid, on pretext of prosecuting our writ for correcting of error, because the said *Benjamin* did not prosecute the said writ with effect, of which the said *Benjamin* is also convicted, as by the record and proceedings, of our said justices and barons by them had, in the premises, and by them remitted to, and remaining in our said court before us at Westminster, also appears to us of record. An have you there then, &c.

Capias ad satisfaciendum *on* nonpros *for not assigning errors in error from the common pleas into the king's bench.*

George, &c. to the sheriff of Middlesex, greeting: We command you, that you take *Benjamin Black*, late of, &c. gentleman, if he be found in your bailiwick, and safely keep him, so that you have his body before us at Westminster, on whereso-

ever

ever we ſhall then be in England, to ſatisfy *William White* fifty pounds, for his damages, which the ſaid *William*, lately in our court, before *Alexander*, lord Loughborough and his companions, then his majeſty's juſtices of the bench at Weſtminſter, recovered againſt the ſaid *Benjamin* for his damages which he ſuſtained, as well by reaſon of the not performing certain promiſes and undertakings made by the ſaid *Benjamin* to the ſaid *William*, at Weſtminſter, in your county, as for his coſts and charges, by him laid out about his ſuit in that behalf, whereof the ſaid *Benjamin* is convicted, as by the record, and proceedings thereof, which we lately cauſed to come into our court before us, for certain cauſes of error, and now there remaining, appears to us of record. And alſo pounds, which were awarded to the ſaid *William*, in our court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts, and charges, which he had ſuſtained, by occaſion of the delay of execution of the ſaid judgment obtained on pretext of proſecuting the ſaid writ for correcting errors, becauſe the ſaid *Benjamin* did not proſecute the ſaid writ with effect, whereof the ſaid *Benjamin* is convicted, as appears to us of record. And have you there this writ. Witneſs, &c.

Stormont and *Way*.

Fieri facias *on* nonpros *for not aſſigning errors in error from the common pleas into the king's bench.*

George the Third, &c. to the ſheriff of Middleſex, greeting: We command you, that you cauſe to be made and levied of the goods and chattels of *Benjamin Black*, late of, &c. gentleman, in your bailiwick, fifty pounds, which *William White* lately in our court, before *Alexander*, lord Loughborough, and his companions, then juſtices of our court of common bench, recovered againſt the ſaid *Benjamin*, for his damages which he hath ſuſtained, on occaſion of the not performing certain promiſes and undertakings lately made by the ſaid *Benjamin* to the ſaid *William*, at Weſtminſter in your county, as for his coſts and charges

charges by him laid out about his ſuit in that behalf, whereof the ſaid *Benjamin* is convicted, as by the record, and proceedings thereof, which we lately cauſed to come into our court before us, for certain cauſes of error, and now there remaining, appears to us of record: And alſo pounds, which were awarded to the ſaid *William* in our court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts, and charges, which he had ſuſtained, by occaſion of the delay of execution of the judgment obtained on pretext of proſecuting the ſaid writ for correcting errors, becauſe the ſaid *Benjamin* did not proſecute the ſaid writ with effect, whereof the ſaid *Benjamin* is convicted, as appears to us of record. And have you the ſaid money before us on wheresoever we then be in England, to render to the ſaid *William* for his damages, coſts and charges aforeſaid, and this writ. Witneſs *William*, earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way*.

Capias ad ſatisfaciendum *upon affirmance in debt in the king's bench, in error from the common pleas.*

George, &c. to the ſheriff of Middleſex, greeting: We command you, that you take *Benjamin Black*, late of Weſtminſter, in your county, gentleman, if he ſhall be found in your bailiwick, and him ſafely keep, ſo that you may have his body before us at Weſtminſter, on wheresoever we ſhall then be in England, to ſatisfy *William White*, as well a certain debt of fifty pounds, which the ſaid *William* lately in our court, before *Alexander*, lord Loughborough, and his companions, our juſtices of the bench, at Weſtminſter, recovered againſt the ſaid *Benjamin*, as alſo pounds, which, in our ſaid court of the bench, were adjudged to the ſaid *William* for his damages, which he ſuſtained by occaſion of the detaining the ſaid debt, as for his coſts, &c. whereof the ſaid *Benjamin* was convicted,

as

as by the record and proceedings thereof which we lately cauſed to come into our court before us, for certain cauſes of error, now there remaining, appears to us of record. And alſo pounds, which were adjudged to the ſaid *William*, in our ſaid court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges, which he hath ſuſtained, by occaſion of the delay of the execution of the judgment aforeſaid, by the proſecution of our ſaid writ of error; the ſaid judgment being in our ſaid court before us in all things affirmed; whereof the the ſaid *Benjamin* is alſo convicted, as appears to us likewiſe of record. And have you there this writ. Witneſs, &c.

Stormont and *Way*.

Fieri facias *upon affirmance in debt in the king's bench, from the common pleas.*

George the Third, &c. to the ſheriff of Middleſex, greeting: We command you, that you cauſe to be made and levied, of the goods and chattels, in your bailiwick of *Benjamin Black*, late of Weſtminſter, in your county, gentleman, as well a certain debt of fifty pounds, which *William White*, lately in our court, before *Alexander*, lord Loughborough, and his companions, our juſtices of the bench at Weſtminſter, recovered againſt the ſaid *Benjamin*, as alſo pounds for his damages which he ſuſtained, by reaſon of the detaining the ſaid debt, as for his coſts and charges by him expended about his ſuit in this behalf, whereof the ſaid *Benjamin* was convicted, as by the record and proceedings thereof which we lately cauſed to come into our court before us for certain cauſes of error, now there remaining appears to us of record: And alſo pounds, which were adjudged to the ſaid *William*, in our ſaid court before us, according to the form of the ſtatute in ſuch caſe made and provided, for his damages, coſts and charges, which he hath ſuſtained, by occaſion of the delay of the execution of the judgment aforeſaid, by the proſecution of our ſaid writ of error; the ſaid judgment being in our ſaid court before us in all things affirmed

affirmed; whereof the ſaid *Benjamin* is alſo convicted, as appears to us likewiſe of record. And have you the ſaid monies before us on wheresoever we ſhall then be in England, to render to the ſaid *William* for his debt and damages, coſts and charges, aforeſaid, and alſo this writ. Witneſs, &c.

Stormont and *Way*.

In *teſtatum* into any other county, after the words, convicted, &c. is added, "And our ſheriff of Middleſex, at a certain day now paſt, returned to us, that the ſaid *Benjamin* was not found in his bailiwick, whereupon it is teſtified in our ſame court before us, that the ſaid *Benjamin* lurks and wanders up and down in your county, and have then there this writ, &c. Witneſs, &c.

Of error returnable in parliament.

The high court of parliament is the laſt tribunal, the *dernier* reſort to which a writ of error lies, and if a judgment of the king's bench be reverſed in the exchequer chamber, a writ of error ſtill lies into parliament, and that court may reverſe the judgment of the exchequer chamber.

Error alſo lies into parliament from *B. R.* even in the actions enumerated in the ſtatute 27 *Eliz. c.* 8. for that ſtatute only gives the party an election in thoſe actions to bring error in the exchequer chamber, but doth not take away the right to have the writ of error returnable in parliament. But if the ſuit be by original in *B. R.* error muſt be always returnable in parliament, for the ſtatute of *Eliz.* only gives the option of error into the exchequer chamber when the ſeven actions ſpecified are originally commenced in *B. R.*

A writ of error that is brought in parliament, is made returnable, if the parliament is ſitting, immediately, or if the parliament is prorogued, then *ad proximum parliamentum*.

If error is brought on a judgment in *B. R.* the chief juſtice conveys the roll with the tranſcript to

the houſe of lords, and leaving the tranſcript there, takes back the roll. 4 *Inſt.* 21. *Cro. Jac.* 341, *Godb.* 247.

When the tranſcript is brought up, a peer is to move the houſe for a day to be appointed for the plaintiff in error to aſſign his error, which is accordingly ordered, and of which the plaintiff muſt take notice, or the tranſcript will be remitted; upon the aſſignment of errors the defendant joins iſſue *in nullo eſt erratum*, and upon another motion, their lordſhips appoint a day for the hearing of the errors; at which day both parties muſt attend with their counſel; but neither party muſt have more than two to plead for him.

The writ is obtained of the curſitor of the proper county, as in other caſes, paying him 6*l.* 1*s.* 6*d.* if no private ſeal, and the curſitor procures the warrant from the king.

It is then taken to the clerk of the errors in *B. R.* who will allow it, paying 4*l.* a copy of which allowance is to be ſerved on the attorney for the plaintiff in the original action.

If bail is required, it is put in as before, and upon the return, that is, on the ſitting of parliament, a rule to tranſcribe is to be taken from the clerk of the errors, and a copy ſerved on the plaintiff's attorney, and the tranſcript is made up by the clerk of the errors, with whom are to be left the pleadings. The clerk of the errors attends the chief juſtice to the houſe, with the roll and tranſcript.

The defendant in error is to petition the houſe, to appoint a day for the plaintiff to aſſign errors, which is generally eight days, and which is to be moved by a peer, upon the petition being left with the clerk of the parliament: If the aſſignment of errors is not filed in the parliament-office with the clerk of the parliament in time, he may petition the houſe for a *nonpros* which will be ordered, commonly with 20*l.* coſts but the coſts are diſcretionary, and not taxed as in other courts, and a *remittitur* of the tranſcript will be made out by the clerk of the parliament.

If the plaintiff in error alledges diminution, and prays a *certiorari*, it is to be iſſued without any mo-

tion

tion, and to be returned in ten days; which if not done, or good cauſe ſhewn to the houſe to the contrary, the plaintiff will loſe the benefit of his writ.

To obtain a hearing the plaintiff in error muſt get a peer to move the houſe that on aſſigning errors the defendant may appear, and make his defence.

If the houſe be likely to riſe ſoon, after aſſignment of errors, the defendant may, on pleading *in nullo eſt erratum*, get a peer to move the houſe upon petition, to appoint a ſhort day for the hearing of the cauſe.

The caſes muſt be drawn up and ſigned by counſel, which are afterwards printed and delivered to the lords by both parties. If the judgment is reverſed, the chancellor, by order of the houſe, pronounces execution accordingly; if affirmed, the record is remanded, and the court of king's bench will iſſue execution; but if the judgment below was for the defendant upon demurrer, and the judgment be reverſed, whereupon a writ of enquiry becomes neceſſary, then as the lords cannot award a writ of enquiry, the record is tranſmitted to *B. R.* for that court to award the writ of enquiry, and upon return thereof to give final judgment.

Standing orders of parliament reſpecting writs of error.

Ordo Dom. Proc. die, ven. 13 *Dec.* 1661.

That the plaintiffs in all writs of error, after the ſame, and the records be brought in, ſhall ſpeedily repair to the clerk of the parliament, and proſecute the writs of error, and ſatisfy the officers of this houſe their fees juſtly due unto them, by reaſon of the proſecution of the ſaid writs of error, and the proceedings thereupon, and further ſhall aſſign their errors *within eight days after the bringing in of ſuch writs with the records*; and if the plaintiff makes default ſo to do, then the ſaid clerk, if the defendant in ſuch writs require it, ſhall record that the plaintiff hath not proſecuted his writ of error; and that the houſe doth therefore award that ſuch plaintiff ſhall loſe his writ,

and that the defendant ſhall go without day, and that the record be remitted: and if any plaintiff in any writ of error ſhall alledge diminution, and pray a *certiorari*, the clerk ſhall enter an award thereof accordingly; and the plaintiff may, before *in nullo eſt erratum* pleaded, ſue forth the writ of *certiorari* in ordinary courſe, without ſpecial petition or motion to this houſe for the ſame; and if he ſhall not proſecute ſuch writ, and procure it to be returned within ten days next after his plea of diminution put in to this houſe, then, unleſs he ſhall ſhew ſome good cauſe to this houſe for the enlarging of the time for the return of ſuch writ, he ſhall loſe the benefit of the ſame; and the defendant in the writ of error may proceed as if no ſuch writ of *certiorari* were awarded.

Die Martis, 19 *Aprilis* 1698.

That no perſon whatſoever do preſume to deliver any printed caſe or caſes to any lord of this houſe, unleſs ſuch caſe or caſes ſhall be ſigned by one or more of the counſel who attended at the hearing of the cauſe in the courts below, or ſhall be of counſel at the hearing of this houſe.

Die Mercur 22 *Dec.* 1703.

Upon conſideration of the great inconveniencies ariſing by motions and petitions for putting off cauſes, after days have been appointed for hearing thereof, it is ordered by the lords ſpiritual and temporal in parliament aſſembled, that when a day ſhall be appointed for the hearing any cauſe, appeal, or writ of error, argued in this houſe, the ſame ſhall not be altered but upon petition; and that no petition ſhall in ſuch caſe be received, unleſs two days notice thereof be given to the adverſe party, of which notice, oath ſhall be made at the bar of this houſe.

Die Veneris, 21 *Feb.* 1717.

Ordered that in all caſes upon writs of error depending in this houſe, when diminution ſhall be at any time alledged, and a *certiorari* prayed and awarded before *in nullo eſt erratum* pleaded, the clerk of the parliament ſhall, upon requeſt to him made, give a certificate that diminution is ſo alledged, and a *certiorari* prayed and awarded thereupon.

Di

Die Sabatis 2 Mart. 1727.

It is ordered by the lords ſpiritual and temporal in parliament aſſembled, that at the hearing of cauſes for the future, one of the counſel for the appellants ſhall open the cauſe; then the evidence on their ſide ſhall be read; which done, the other counſel for the appellants may make obſervation on the evidence; then one of the counſel for the reſpondents ſhall be heard, and the evidence on their ſide ſhall be read; after which the other counſel for the reſpondents ſhall be heard, and one counſel only for the appellants to reply.

Petition for a nonpros *for not aſſigning errors.*

To the right honourable the lords ſpiritual and temporal in parliament aſſembled.

The humble petition of *William White* defendant, in a writ of error brought into this honourable houſe, wherein *Benjamin Black* is plaintiff.

Sheweth,

THAT your petitioner having recovered a judgment in his majeſty's court of king's bench, againſt the plaintiff in error above-named, for one hundred pounds damages and coſts, the plaintiff hath brought a writ of error thereon, returnable before your lordſhips, and the record having been tranſcribed, was, together with the ſaid writ, brought up into this honourable houſe, on the day of laſt.

That the ſaid plaintiff in error has not aſſigned any error or errors in the ſaid record and proceedings within the time allowed by the uſual and ſtanding order of this honourable houſe.

"Your petitioner therefore moſt humbly prays that your lordſhips will be pleaſed to order a *nonpros* to be entered on the ſaid writ of error, with ſuch coſts for the delay of the execution of the judgment, as to your lordſhips in their great wiſdom ſhall ſeem meet.

"And your petitioner ſhall ever pray, &c.

The

The like for a ſhort day to aſſign errors at the cloſe of a ſeſſion.

To the right honourable the lords ſpiritual and temporal in parliament aſſembled.

The humble petition, of &c. *(as before.)*

Sheweth,

[After ſtating the judgment recovered, to the day the tranſcript is brought up.]

That the ſaid writ of error is only brought for delay, and in order to harraſs and oppreſs your petitioner, and to prevent him from having execution on his ſaid judgment, and not with any real deſign, as your petitioner verily believes, of aſſigning any error or errors upon the ſaid judgment.

"Your petitioner therefore moſt humbly prays, that your lordſhips will be pleaſed to order, that the ſaid plaintiff in error, ſhall aſſign error or errors upon the judgment aforeſaid, by ſuch ſhort day as your lordſhips ſhall be pleaſed to appoint, or that your petitioner may have ſuch other relief in the premiſes as to your lordſhips in your great wiſdom ſhall ſeem meet.

"And your petitioner ſhall ever pray, &c."

Aſſignment of errors.

Afterwards, that is to ſay, on the- day of in the twenty-third year of the reign of our ſovereign lord George the third, &c. before the king himſelf in parliament, the ſaid *Benjamin* by *C. D.* his attorney comes and ſays, that in the record and proceſs aforeſaid, and alſo in giving the judgment aforeſaid, is there manifeſt error in this, to wit, &c.

Teſtatum

Teſtatum fieri facias *upon a judgment affirmed in parliament.*

George the third, &c. To the ſheriff of Middleſex greeting: Whereas we lately commanded our ſheriffs of London, that they ſhould cauſe to be made and levied of the goods and chattels of *Benjamin Black*, late of _ gentleman, the ſum of which *William White*, lately in our court before us at Weſtminſter, by our writ, and by the judgment of the ſame court recovered againſt the ſaid *Benjamin* for his damages which he had ſuſtained, as well by reaſon of the not performing certain promiſes and undertakings made by the ſaid *Benjamin* to the ſaid *William*, as for his coſts and charges by him about his ſuit in this behalf expended, whereof the ſaid *Benjamin* was convicted, as appeared to us of record in our ſaid court before us, and alſo lately adjudged to the ſaid *William*, in our court of parliament before us, and the lords ſpiritual and temporal in the ſame parliament aſſembled, for his damages, coſts and charges which he had ſuſtained by reaſon of the delay of the execution of the judgment aforeſaid, for that the ſaid *Benjamin* hath not further proſecuted a certain writ brought by him in the premiſes againſt the ſaid *William* in the ſame court of parliament for correcting error, with effect, of all which the ſaid *Benjamin* was convicted as appeared to us of record in our ſaid court before us, and that our ſaid ſheriffs of London ſhould have the aforeſaid monies before us at Weſtminſter at a certain day now paſt, to render to the ſaid *William* for his damages coſts and charges aforeſaid, and our ſaid ſheriffs of London at that day returned to us, that the ſaid *Benjamin* had no goods or chattels in their bailiwick, whereof they could levy the ſaid monies, or any part thereof; whereupon it is ſufficiently teſtified in our ſaid court before us, on the behalf of the ſaid *William*, that the ſaid *Benjamin* hath goods and chattels in your bailiwick, ſufficient

to

to levy the ſame; therefore we command you, that of goods and chattels of the ſaid *Benjamin* in your bailiwick, you cauſe to be made and levied the aforeſaid and and you have the ſame before us, , whereſoever, &c. to render to the ſaid *William* for his damages, coſts and charges aforeſaid, and have you there alſo this writ. Witneſs *William* earl Mansfield, at Weſtminſter, the day of in the twenty-third year of our reign.

Stormont and *Way*.

A writ of error doth not determine by the prorogation of parliament, 2 *Lev.* 93. But if the parliament is diſſolved, the writ of error is abated.

If a writ of error is brought in the exchequer chamber, and that being diſcontinued, another is brought in parliament, the ſecond writ is a *ſuperſedeas*, but if a writ of error be brought in parliament and that abates, and the plaintiff brings a ſecond that is no *ſuperſedeas*, becauſe it is in the ſame court, 1 *Vent.* 100.

A writ of error returnable in parliament was diſcontinued by the prorogation, another writ was brought teſted the laſt day of the ſeſſions, 1 March, returnable 19 November, to which day the parliament was prorogued. Reſolved by the court, that although the firſt writ was not diſcontinued by any act of the party, yet the ſecond writ ſhould be no *ſuperſedeas*. 1 Vent. 31.

Error from *B. R.* of a judgment for defendant into *Dom. Proc.* and the judgment was reverſed, and the record remitted into *B. R.* whereupon the plain-plaintiff moved in *B. R.* for a new judgment. *Per cur.* A new judgment cannot be given here contrary to that which is already given, the ſame court which reverſed muſt give a new judgment. *Carth.* 319. *Ld. Raym.* 9, 10.

Chap. XLVIII.

Of the writ of Audita Querela.

THIS writ, which is the commencement of an action ſomewhat in the nature of a bill in equity, to be relieved againſt ſome oppreſſion of the plaintiff, ſtates that the complaint hath been heard, *audita querela defendentis*, and ſetting forth the matter of the complaint, commands the court to call the parties before them, and after having heard, to do juſtice between them. As to give relief againſt a judgment or execution awarded or likely to be awarded againſt the party upon ſome ground of injuſtice pointed out to the court.

An *audita querela* doth not lay where there is any other remedy at law; ſave, in a few inſtances, in which the party hath his election of this, or another mode of redreſs.

The liberality of the courts in granting relief upon motion, and the greater frequency of applications to the courts of equity, have almoſt ſuperſeded the uſe of the writ of *audita querela*, which formerly was, where the party had a good defence; but by the common courſe of law had not an opportunity to avail himſelf thereof; as it is held that relief may be granted upon motion in caſes proper for an *audita querela*, where it is not grounded upon ſome foreign matter, as a releaſe, &c. *Ld. Raym.* 439. *Barnes* 277. but there are yet ſome caſes in which it muſt ſtill be the remedy.

Thus where the party has a matter which he might have pleaded to a *ſcire facias*, and two *nihils* are returned, and judgment againſt him, the court will relieve him upon motion, without putting him to an *audita querela*; but otherwiſe, if a *ſcire feci* be returned. *Salk.* 93.

An *audita querela* ſhall be granted out of the court where the record on which it is founded remains, and ſuch *audita querela* out of the rolls of the ſame

court is *judicial*, but it may be *original*, and the party may ſue it out of *Chancery*, returnable in the court where the record remains.

But it cannot be granted out of any court, returnable in the ſame court, where the record upon which it is founded is not there. *F. N. B.* 105. *b.*

It ſhall be allowed only in open court, 1 *Bulſ.* 140. 2 *Bulſ.* 97. and on motion *R. Trin.* 9 *Jac.* 1. and therefore when the curſitor hath made out the writ, it muſt be allowed by the ſecondary in court.

The plaintiff in an *audita querela*, may be bailed if he ſhews matter in writing for his diſcharge, and the defendant be demanded whether he can gainſay it. 1 *Rol.* 133, 384. 2 *Rol.* 113. *l.* 5.

If he hath a releaſe or other writing, upon which the *audita querela* is founded, the ſame muſt be proved in court by the witneſſes, before the writ of *audita querela* be allowed, or a *ſuperſedeas* granted, 1 *Sid.* 351. *Salk.* 92. and then if not in execution, he may be bailed by the court, and on motion have a *ſuperſedeas*, Salk. 92. if in execution he cannot be bailed, until the defendant plead to the *audita querela*. But an infant taken in execution brought an *audita querela*, and on clearly proving his nonage, was diſcharged. *Carth.* 279.

The proceſs on an *audita querela*, when founded on a record, or the party be in cuſtody, is a *ſcire facias*. But if grounded on a matter of fact, or the party be not in cuſtody, but only brought *quia timet*, the proceſs is a *venire facias*, and afterwards a *diſtringas ad infinitum*. Salk. 92.

It is no *ſuperſedeas* of itſelf, and therefore execution may be taken out, unleſs a *ſuperſedeas* be ſued out upon the allowance of the writ of *audita querela*. Salk. 92.

If the firſt writ of *audita querela* abate, upon a ſecond purchaſed, the party may have another *ſuperſedias*. F. N. B. 104. n.

The bail for a party in execution, who is admitted to bail on an *audita querela*, muſt be four perſons, who are to be bound that he ſhall proſecute the ſuit with effect, and if he make default or be convicted, pay

pay the condemnation money, or that they ſhall do it for him, ſo that the bail cannot afterwards render him in their diſcharge.

Bail piece on an *audita querela*.

Term, in the twenty-third year of king George the Third.

Middleſex, to wit. } *Benjamin Black*, of &c. is delivered on bail, to proſecute with effect, a writ of *audita querela*, brought by him to be diſcharged of and from a judgment given againſt him, in the court of our lord the king before the king himſelf, at the ſuit of one *William White*, for two hundred pounds debt, and for damages, coſts and charges to

Richard Red, of &c.
George Green, of &c.
John Blue, of &c.
Thomas Brown, of &c.

C. D. attorney.

Recognizance.

You ſeverally acknowledge yourſelves to owe to *William White*, of &c. the ſum of four hundred pounds.

Upon condition that the ſaid *Benjamin Black* ſhall proſecute his ſuit with effect, and if he ſhall be convicted, or make default in the premiſes, that he ſhall pay the condemnation money, or you ſhall do it for him.

An *audita querela* does not lie after judgment, upon a matter which might have been pleaded before, but where the party was condemned and had no day in court to plead it, an *audita querela* lies. *Cro. Eliz.* 95.

If a releaſe be given after the day of *niſi prius*, and before the day in bank, the defendant cannot plead it, becauſe there is a verdict in the cauſe, which is already determined upon another plea, ſo that he is put to his *audita querela* to hinder execution. 2 *Lutw.* 1143, 1174.

If debt is brought on a judgment and judgment recovered thereon, and afterwards the firſt judgment is reverſed on a writ of error, an *audita quarela* lies for relief on the ſecond judgment; but if a *ſcire facias* was brought upon a judgment, and the defendant having a releaſe omits to plead it, he ſhall not afterwards have an *audita querela*.

One taken in execution and ſet at liberty by the plaintiff, and then taken again upon the ſame execution, may have an *audita querela* to be diſcharged; for the execution being once diſcharged, is ſo for ever, and ſuppoſes a ſatisfaction.

Judgment againſt the anceſtor who pays it and dies, not having taken a releaſe or deed upon the payment. Reſolved, that the heir may maintain an *audita querela* upon the payment, though no deed or ſpeciality. 2 *Keb.* 455.

The plaintiff, a *feme ſole*, married after the interlocutory judgment, and before execution of the writ of enquiry, motion to ſet aſide the writ of enquiry and inquiſition refuſed, and the party left to his *audita querela*. Bunb. 283.

If two are bound in an obligation, jointly and ſeverally, and judgment is given againſt one *in banco*, and the other *in banco regis*, and one is taken in execution *in banco regis*, and then an execution is taken out againſt the other *in banco*, by *elegit*, and lands and goods delivered in execution thereon, he that is in execution *in banco regis*, ſhall be delivered upon an *audita querela*, becauſe the execution upon an *elegit* is a ſatisfaction. *Hob.* 2. *Cro. Jac.* 538. 2 *Balf.* 97. *Rol. Rep.* 8, 9.

No bail is required on an *audita querela*, brought by bail, to be relieved againſt a judgment or execution had againſt them for the debt of the principal, unleſs the bail are in execution.

Judgment

Judgment againſt bail upon a *ſcire facias*, upon default of their principal, and afterwards the original judgment is reverſed; the bail may be relieved by *audita querela* having no other remedy, having had no opportunity to plead it. 1 *Roll. Abr.* 308.

Judgment in debt againſt *H.* who died, not having ſatisfied the debt, or rendered, *ſcire facias* againſt the bail, and after two *nihils* execution awarded, and upon *audita querela*, becauſe no *capias ad ſatisfaciendum* had been awarded againſt *H.* they had judgment, *Cro. Eliz.* 597.

If the ſuit was by original, there ſhould be fifteen days between the *teſte* and return of the proceſs upon the *audita querela*, which muſt be returnable upon a general return; but by bill, fifteen days between the *teſte* of the firſt, and the return of the ſecond *ſcire facias* are ſaid to be ſufficient, and the writs ſhould be returnable on a day certain.

The defendant in the *audita querela* ſhould be warned to appear.

If the defendant in *audita querela* appears, the plaintiff declares, beginning in this manner:

"Our lord the king, ſent to his juſtices aſſigned to hold pleas before the king himſelf, his writ cloſed in theſe words, to wit, George the Third, &c. (reciting the whole writ of *audita querela*.")

The better form is to recite the whole record of the recovery, in the declaration on an *audita querela*, or it may be recited generally. But if there is a variance between the *audita querela* and the declaration, the writ abates. *F. N. B.* 104. *R.*

In the entry of the declaration, after the writ of *audita querela* is ſet forth, the plaintiff ſuggeſts the *gravamen*, and prays to be diſcharged, &c. afterwards is ſet forth the award of the *ſcire facias*, or *venire*, &c. and the recognizance, if any, of bail, then the return to the *ſcire facias* or *venire*, and the defendant's appearance.

If the matter is confeſſed, the plaintiff hath judgment and diſcharge by confeſſion; but if it is denied the parties proceed to iſſue in fact or in law, as in other caſes.

No

No damages or coſts can be given to a plaintiff in an *audita querela*.

By *venire facias*, the plaintiff in *audita querela* may have diſtreſs infinite till the defendant appears; but if the defendant doth not appear and plead after two *ſcire facias's* and two *nihils* returned, there ſhall be judgment againſt him.

If there be judgment for the defendant in an *audita querela* before he have execution upon his firſt judgment, he may afterwards purſue execution upon that. 1 *Vent.* 264.

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Ex. E. B. L.